Petition

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VOLKSWAGENWERK, A.G. a West German Corporation and VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation,

Petitioners,

vs.

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Does retaining alternate jurors, after the jury has begun deliberation, in contravention of Federal Rule of Civil Procedure 47(b), and substituting them during deliberation, without authority in rule or statute, deprive the parties of their Seventh Amendment right to a fair and impartial jury trial and may alternative jurors be kept and be substituted without an express and intelligent waiver?

2. Does a trial court's denial of a mistrial either (1) where the jury is tainted by exposure to outside information from a television program adverse to the defendants and where some jurors, under oath, misled the court as to their exposure or (2) where the jury is tainted by the presence of alternate jurors, who were together for an entire day while the jury deliberated, and were then substituted for members of that jury without voir dire, deprive the defendants of their Seventh Amendment right to a fair and impartial jury trial?

3. Has Congress preempted the promulgation of ad hoc jury established standards in second collision motor vehicle design cases by the provisions of the National Traffic and Motor Vehicle Safety Act when the jury standards are inconsistent with the federal standards?

4. Have motor vehicle manufacturers been denied procedural due process by the imposition, under a theory of law neither adopted nor predicted by North Carolina courts, of a jury-established ad hoc motor vehicle safety standard when such standard is inconsistent with the federal motor vehicle safety standards?

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BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Volkswagenwerk, A.G. and Volkswagen of America, Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (the "Court of Appeals") filed on April 27, 1981.

Opinions Below

The opinion of the Court of Appeals (the "Opinion") is reported and appears at *Seese* v. *Volkswagenwerk, A.G.*, 648 F.2d 833 (3d Cir. 1981). The Order of the Court of Appeals denying Volkswagenwerk, A.G. and Volkswagen of America, Inc.'s Petition for Rehearing En Banc, dated June 26, 1981 appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was filed on April 27, 1981. See *Seese* v. *Volkswagenwerk, A.G.*, 648 F.2d 833 (3d Cir. 1981) and App. A, 1a-46a. A timely Petition for Rehearing En Banc was denied on June 26, 1981. App. B, 47a-48a. This Petition for Writ of Certiorari was filed within ninety days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976). App. C, 55a.

Federal Constitutional Provisions and Statutes Involved

The questions presented in this petition involve the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the Seventh Amendment and Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. VII and Amend. XIV respectively; the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1381 *et seq.* (1976) and regulations promulgated thereunder; and Fed. R. Civ. P. 47(b) ("Rule 47(b)" hereinafter). The Constitutional provisions and statutes are set out in Appendix C.

Statement of the Case

The District Court Proceeding. This case involves a product liability action arising out of a single vehicle accident which occurred on a rural highway in North Carolina. *See Seese* v. *Volkswagenwerk, A.G.*, 648 F.2d 833 (3d Cir. 1981) (hereinafter referred to as "*Seese Opinion* at appendix page"). App. C, 1a-46a. On July 18, 1975, Martin Ramos borrowed a 1974 Volkswagen Microbus, a forward control van, (hereinafter referred to as "Type II") which he drove to work at Cherry Point, North Carolina. *Id.* Later that evening, Ramos agreed to transport four individuals from Cherry Point to Camp LeJeune, North Carolina. Shortly after leaving Cherry Point, a violent, single car rollover occurred, resulting in injuries to the plaintiffs. *See Seese Opinion,* App. A, 2a-3a.

On July 14, 1977, the plaintiffs filed suit in Federal District Court in New Jersey against Volkswagen of America, Inc. and Volkswagenwerk, Aktiengesellschaft (hereinafter collectively referred to as "petitioners") and Thomas S. Weir.[1] Plaintiffs alleged that the accident was the fault of Thomas S. Weir, who, they asserted, forced the Type II off the road by driving into their lane. *Id.* Plaintiffs also alleged that petitioners were negligent in the manufacture and/or design of the vehicle and that said negligence caused the injuries sustained by the plaintiffs. *Id.* Petitioners counterclaimed against Ramos, alleging that the accident was caused by the sole negligence of Ramos. App. E, 119a-120a, 130a-131a.

Prior to trial, the court directed that North Carolina substantive law would apply to the trial of the matter. App. M, 145a-156a. A pretrial motion was filed by petitioners seeking to strike, *inter alia*, plaintiffs' causes of action sounding in (1) strict liability, and (2) the alleged negligence of petitioners in failing to design a crashworthy vehicle, since North Carolina had never adopted either cause of action. *Id.*

The trial court decided that if the North Carolina Supreme Court were confronted with the issue, it would adopt the doctrine of strict liability and denied the motion. App. N, 157a-187a. The trial court similarly reasoned that if the North Carolina Supreme Court were confronted with the issue, it would adopt the theory of crashworthiness. App. N, 187a-188a.

Following these rulings, the trial of the matter proceeded on two causes of action. The plaintiffs' strict liability theory was predicated upon an alleged defect in the manufacture of the ball cage located in the outboard right rear constant velocity joint. App. N, 187a-188a. The ball cage allegedly failed thereby causing the vehicle to go out of control and rollover. App. D, 87a.

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[1] Weir is not a party to this Petition. *See Seese Opinion,* App. A, 3a n.2.

The second theory of liability, sounding in negligence, fell within the generic category of crashworthiness or second collision cases. *Seese Opinion,* App. A, 3a. Under this theory, plaintiffs alleged that the windshield and left side center window of the Type II should have retained the plaintiffs within the vehicle during the accident sequence, but that due to alleged negligent design, the windshield and left side center window "popped out" thereby permitting the ejection of the plaintiffs. *Id.*

The petitioners denied these allegations and maintained that the design of the windshield and windows were consonant with the multi-purpose features of the Type II, were within the state of the art and were not unreasonably dangerous. *Seese Opinion,* App. A, 42a-44a. Petitioners maintained that the high speed nature of the accident, the forces exerted by the unrestrained occupants and the severity of the occurrence resulted in these injuries. *Id.* Petitioners further maintained that they should be permitted to cross-examine and introduce evidence about the available seat belt restraints in the Type II on the issue of negligent design in the crashworthiness claim. App. N, 189a-192a. However, the trial court disagreed with the petitioners and refused to permit the petitioners to introduce any evidence with regard to the available seat belts. App. N, 215a-216a.

At the conclusion of the plaintiffs' case, petitioners moved for a directed verdict in their favor which motion was denied. App. N, 208a-211a. Petitioners renewed their motion for a directed verdict at the conclusion of the case. App. I, 136a-137a. This motion was also denied, App. K, 141a-142a, and the jury rendered its verdict for plaintiffs on December 19, 1979. App. N, 231a-233a. The jury found: (1) that, under the theory of strict liability, the ball cage of the constant velocity joint was defective and caused the accident, and (2) that under a theory of negligence, based on crashworthiness, petitioners negligently designed the windshield and side windows in the 1974 Type II in issue. The jury found Ramos to be free of negligence. The aggregate award to the plaintiffs was $1.95 million. App. J, 138a-140a.

The Court of Appeals' Opinion. On appeal to the United States Court of Appeals for the Third Circuit, petitioners sought reversal of the Judgment on the basis that, *inter alia,* (1) the trial was tainted by the district court's failure to dismiss alternate jurors at the commencement of the jury's deliberations in contravention of Rule 47(b) and the district court's substitution of two alternate jurors subsequent to the commencement of the jury's deliberations in violation of Rule 47(b) and in violation of the constitutional right to an impartial jury as guaranteed by U.S. CONST. Amend. VII*, and (2) the Federal Motor Vehicle Safety Standards ("FMVSS") codified at 49 C.F.R. 571.200 *et seq.* (1980) preempt conflicting state standards and inconsistent jury-imposed standards which are not identical to FMVSS and inconsistent jury adjudications. In affirming the actions of the district court, the Court of Appeals relied upon the agreement of counsel for all parties to the aforesaid procedure, and further, upon the instructions of the district court to the reconstituted jury that it should begin its deliberations anew. *Seese Opinion,* App. A, 26a-33a.

While the majority of the Court of Appeals did not choose to address the constitutional issues raised by the petitioners, the dissenting opinion of Judge Adams served to underscore the importance of these critical issues. Judge Adams stated:

> [T]he problems generated by the present case ultimately serve to underscore the perception in *Dawson* [*Dawson* v. *Chrysler Corp.,* 630 F.2d 950 (3d Cir. 1980)]: The existing system for assessing liability in compensating injuries in automobile accident cases, which permits individual juries under different state systems to arrive at discrepant outcomes that impose conflicting standards on manufacturers, is far from efficient or fair.
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* Facts underlying the issue of jury taint are more fully developed in the discussion at Point I, *infra.*

> The ultimate effect of jury verdicts which reach beyond federal safety standards and are arrived at under different state laws, is the imposition of conflicting requirements on producers attempting to satisfy a nation-wide market. In the course of the present trial, VW found itself caught between Scylla and Charybdis, so to speak. On the one hand, VW's obligations were measured by national statistics which are arguably inappropriate for this type accident or this type van. On the other hand, the jury assessing liability was guided by insufficiently articulated state law.

Id. 44a-45a (footnote omitted). As noted, the majority did not address these issues and the judgment of the district court was affirmed. *Id.* 31a-33a. It should also be noted that the district court's prediction as to North Carolina's adoption of strict liability proved to be erroneous, and therefore, the Court of Appeals reversed that part of the judgment. *Id.* 7a-10a. The affirmance was based upon the Court of Appeals' finding that the district court had not erred as to its crashworthiness prediction. *Id.* 13a-15a. The uncertainty and prejudicial effect wrought by such prognostications in automobile product liability cases is apparent and will be established herein.

On June 26, 1981, the Court of Appeals denied the petitioners' Petition for a Rehearing En Banc. App. B, 47a-48a.

Reasons For Granting The Writ. The writ should be granted because this case raises important federal questions which require resolution by this Court. With respect to the issue of jury taint, the mandatory provisions of Rule 47(b) regarding discharge of alternate jurors have been the subject of conflicting interpretation and application by the various circuits. Clearly, a definitive ruling by this Court is essential in order to settle the proper application of Rule 47(b) in accordance with the precepts embodied in the provisions of the Seventh Amendment, U.S. Const. Amend. VII, and to realize the goal of procedural uniformity of the Federal Rules of Civil Procedure.

With respect to the constitutional issues of preemption and due process the judgment affirmed by the Third Circuit represents a clash of epic proportions between official state activity (in the form of conflicting court-allowed litigation and judgments regarding standards of automotive crash safety performance) and federally-mandated motor vehicle safety standards governing crash safety performance which Congress has declared must be nationally uniform. Given the explicit provisions of the National Traffic and Motor Vehicles Safety Act ("Safety Act"), 15 U.S.C. §1381 *et seq.* (1976), App. C, 50a, that states are proscribed from adopting safety standards "not identical" to the federal standards regulating the "same aspect of performance" [15 U.S.C. §1392(d) (Supp. 1979)], App. C, 51a-52a, and an expressive legislative history, a major and novel "preemption" question is presented which should be reviewed and resolved by this Court. Further, there are important due process issues which merit review.

In short, the problem of preemption is now clearly presented and the time is ripe for review. An economically-beleaguered industry and an energy-starved nation cannot afford the costs of astronomical verdicts if they are based upon prohibited standard-setting by the states. Accordingly, petitioners respectfully urge this Court to accept review of this matter for the purpose of dissipating the confusion engendered by the decision below and to consider all policy ramifications bearing upon the constitutional issues.

I. Rule 47(b) is mandatory and requires dismissal of alternates when the jury begins its deliberation and failure to so dismiss them deprives defendants of their Seventh Amendment right to a jury trial.

Rule 47 provides in pertinent part:

> (b) Alternate jurors. . . . An alternate who does not replace a regular juror *shall* be discharged after the jury retires to consider its verdict. (Emphasis supplied).

In the instant case, at the conclusion of an approximately eleven week long trial, there remained six primary jurors and four previously designated alternate jurors. Prior to charging the jury, the district court announced: "The alternates will be kept, so you all please pay attention to the instructions on the law, just as the regular jurors will be, the jurors in the main will." App. N, 214a. At the conclusion of the charge, the court stated: "The alternates may not be present when you deliberate at any time, but I will keep them available separately." App. N, 216a. Thus, the district court contravened the mandatory provisions of Rule 47(b) and retained the alternate jurors when the jury began its deliberations.

Furthermore, no separate instructions were given to the four alternate jurors by the district court with respect to whether they were free or not to discuss the case among themselves while the jury deliberated. The four alternates thus remained at the courthouse separate from the jury for the entire balance of the day. Several hours after the jury was deliberating, the jury sent a note to the court and thereupon the court assembled the jury and alternate jurors and responded to the note. App. N, 219a. Neither party consented or objected to this procedure. App. N, 218a-219a. Following this response to the first note of the jury, the jury and alternate jurors were then separated without further instruction. The court at this point indicated that its ability to substitute alternate jurors as the deliberations went on would become questionable. In fact, the district court stated: "Under the federal rules, I don't know if there is any authority to keep the jury around." App. N, 221a.

At the end of the first day of deliberations, the court received a note from the jury which stated: "Five feel ball cage was defected; one feels it was not." App. N, 222a. Again, the jury and alternate jurors were assembled and a response was given to the note. App. N,

223a-224a. At this point, the district court excused the jurors for the evening with the instruction that they were all to return in the morning. App. N, 224a-225a. One of the alternate jurors was excused at this point. On the following morning, two members of the jury were delayed due to a snow storm. App. N, 226a. When four members of the jury and the three alternates were present, the Judge announced: "I'm going to put in the two alternates." App. N, 226a. Again, counsel for the parties were present and did not object to this procedure. However, the court did not conduct any voir dire of the alternate jurors in order to determine whether they had discussed the case between themselves or with any third parties while the jury had been deliberating. The sole instruction given to the newly constituted jury was a cursory admonition by the court that they should begin their deliberations anew. App. N. 226a.

Upon reflection and review of the procedures engaged in by the district court with respect to the retention and substitution of alternate jurors, the petitioners moved for a mistrial based upon (1) the alternates not being discharged as required and (2) the alternates being allowed, after becoming "strangers" to the jury deliberations, to deliberate with the members of the jury. App. N, 227a-230a. This motion was denied by the district court.* App. N, 228a-230a.

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* Petitioners also moved for a mistrial because the jurors and alternates had disregarded instructions given to them concerning a highly prejudicial television program. In the middle of plaintiffs' case, a television series, "20/20," aired a program whose subject was alleged design defects in Volkswagen vehicles. Plaintiffs' expert, Byron Bloch, had appeared on the program. App. N, 193a-194a. Voir dire revealed that at least five of the eight deliberating jurors had some exposure to the show ranging from general awareness of the show's subject matter to particular knowledge that Byron Bloch had appeared on the show. App. N, 197a-207a. Despite instructions it is apparent that a majority of the deliberating jurors had substantial exposure to the show and had discussed the show with non-jury members and among themselves and were thus enabled to construct a composite picture highly prejudicial to the position of Volkswagen.

The foregoing series of events clearly resulted in infringement upon the traditional and constitutionally protected right of the petitioners to a fair and impartial jury determination unhampered by extraneous influences. Waiver of a jury trial or of the mandatory admonition to discharge alternates is not the issue herein, but rather the sanctity of the jury process once the parties have opted for a jury trial. By rules of evidence and instruction the court controls what the jury may hear and consider. The jury deliberation process is designed to be secret and unwitnessed by strangers. To this end the jury is only to deliberate together and to reach their conclusions free of extraneous outside influences. *Cf. State* v. *Kociolek,* 20 N.J. 92, 103-104 (1955). This process is destroyed by substituting alternates after the jury has begun deliberations. Such a procedure allows jurors to discuss the case not as a jury but in groups separate from other jurors.

In the instant matter, the district court having decided upon this course of action manifested a coercive atmosphere such that counsel was reticent "to oppose the stated preference of the trial judge." *United States* v. *Viserto,* 596 F.2d 531, 540 (2d Cir.), *cert. denied,* 444 U.S. 841 (1979). Certainly, after an eleven week jury trial, the proper application of the mandatory provisions of Rule 47(b) was the responsibility of the trial judge presiding over the matter, since by its mandatory terms, this rule is one which must be administered by the trial court and not left to the discretion of the attorneys for the parties. Thus, the error was committed once the district court retained the alternate jurors. Had the alternate jurors been dismissed in accordance with the provisions of Rule 47(b), there simply would have been no opportunity to insert the alternate jurors during the second day of deliberations. The sanctity of the jury process would have remained inviolate.

Moreover, the alternate jurors became strangers to the proceedings once the jury had begun its deliberations.

From the moment that jury deliberations commenced the alternate jurors were completely removed from the free and impartial interchange of ideas which took place during the deliberative process on the first day. Without instruction, the four alternates were free to discuss the case among themselves. Additionally, the alternates were exposed to the jury's predisposition for the plaintiffs' cause when the trial judge informed the alternates of the jurors' inquiry indicating that five jurors believed the ball cage joint to be defective. This effectively denied the jurors their own independent judgment and injected a coercive element into the deliberative process. Once the jury revealed its mental process, substitution of the alternates was a denial of petitioners' right to a fair and impartial jury trial.

A. History of Rule 47(b).

The federal Rules of Civil Procedure went into effect on September 16, 1938 and were designed to promote a uniform federal practice. *See* J.S. Moore, Moore's Commentary on the U.S. Judicial Code at 6 (1949). Rule 47(b) remained the same through the various amendments to the Federal Rules until 1966.* App. C, 56a-59a.

During the meetings of the Advisory Committee concerning the rule changes which went into effect in 1946, the Committee in its initial drafts proposed that alternates could be substituted after the jury retired. *See* L. Orfield, *Trial Jurors in Federal Criminal Cases,* 29 F.R.D. 43, 44 (1962). When the draft was submitted to this Court for comment, the Court asked:

> Has the committee satisfied itself that it is desirable or constitutional that an alternate juror may be substituted after the jury has retired and begun its deliberation?

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* The changes to the rule in 1966 made Rule 47(b) the exact equivalent of Fed.R.Civ.P. 24(c). *See* Committee Note of 1966 to Subdivision (b), 5A Moore's Federal Practice ¶47.01[4] (1980).

Id. at 46. The Committee upon reflection thereafter withdrew the aforesaid proposal. *Id.* at 50. Again, during the Advisory Committee meetings concerning rule changes which went into effect in 1966, the procedure, followed by the trial court in the instant matter was again recommended and rejected in 1965 as a proposed amendment to Rule 47(b). *See* Committee on Federal Rules of Civil Procedure Judicial Conference—Ninth Circuit, Supplemental Report, 37 F.R.D. 71, 72, 74, 77 (1965).*

Thus, the rule has retained the above quoted mandatory requirement that the alternates shall be discharged when the jury retires because that provision is both desirable and passes constitutional muster.

B. Conflict among the Circuits.

While the above history of Rule 47(b), App. C, 56a-59a, and its identical counterpart Rule 24(c), App. C, 59a-61a, of the Federal Rules of Criminal Procedure, which must be read *in pari materia,* makes clear that the rule is mandatory and that failure to follow it by the trial court necessitates a new trial, it is also true that the rule has been variously interpreted by numerous Circuits to the end that there is no uniform federal practice with respect to Rule 47(b). Moreover, not only do the decisions by the various Circuits conflict with each other but various decisions within certain Circuits are conflicting.

The Fourth Circuit in *United States* v. *Virginia Erection Corp.,* 335 F.2d 868 (4th Cir. 1964) established a *per*

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* Commenting with approval of the above rejection by the Advisory Committee, the American Bar Association Project on Standards for Criminal Justice in its report stated that the rule change was "rejected by the Advisory Committee because of a belief that it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of the prior group discussion." American Bar Association Project on Standards for Criminal Justice, Standards Relating to Trial by Jury 2.7 at 82 (Approved Draft, 1968).

se rule that Rule 24(c) of the Federal Rules of Criminal Procedure (identical to Rule 47(b) of the Federal Rules of Civil Procedure) requires that an alternate who does not replace a regular juror prior to the time the jury retires "*shall* be discharged after the jury retires to consider its verdict." *Id.* at 871. The Fourth Circuit therein ordered a new trial, asserting that substitution of alternates collides not only with the above rule but "with traditional principles of jury secrecy" and that even with consent of counsel the rule may not be changed. *Id.* at 873. Thereafter, the Fourth Circuit followed the *per se* rule in *United States* v. *Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978).

However, in a two to one decision, the Fourth Circuit in *United States* v. *Evans*, 635 F.2d 1124, 1127 (4th Cir. 1980) stated that the requirements of the rule could be waived by the defendant himself if the criteria for waiver of constitutional rights as enunciated in *Patton* v. *United States*, 281 U.S. 276 (1930), were met.*

The Third Circuit in *Truscott* v. *Chaplin*, 403 F.2d 644, 645 (3d Cir. 1968) indicated that Rule 47(b) is mandatory. However, in the instant matter, the Third Circuit held that discharge was not mandatory if all parties agreed that the alternates would not be discharged.

The Second Circuit's standard is that Rule 24(c) of the Federal Rules of Criminal Procedure is mandatory but if substitution takes place, the Court requires a showing of prejudice such as demonstration that the nondischarged alternates *participated* in the deliberations. *See United*

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* This court in *Patton* held that before a waiver of jury trial could be made there must first be "express and intelligent consent of the defendant." *Patton* v. *United States*, 281 U.S. 276, 312 (1930). The issue concerning substitution of alternates is qualitatively different from waiver of a jury. The jury is not being waived; it is still the fact finder. The question of substitution is whether that body is competent, *i.e.*, with free and open minds, when alternates who have been left to their own devices are inserted into a jury which has already deliberated for several hours.

States v. *Hayutin*, 398 F.2d 944, 950 (2d Cir.), *cert. denied*, 393 U.S. 961, *reh. denied*, 393 U.S. 1045 (1968). *See also United States* v. *Viserto*, *supra*.

Thus, under either the *per se* rule or the Second Circuit's rule, the district court's decision herein, as sanctioned by the Third Circuit, compels a new trial.

The Tenth Circuit in *United States* v. *Beasley*, 464 F.2d 468 (10th Cir. 1972) held that while the rule is mandatory, the critical time for determining whether prejudice exists is when "the jury has begun its function as a separate entity." *Id.* at 471. Since the jury in *Beasley* had begun deliberations, the Tenth Circuit held that the failure to discharge the alternates and having them present with the jury was prejudicial and required a mistrial. *Id.* In a later case, however, the Tenth Circuit stated that, if the defendant's consent to the substitution of the alternates met the criteria set forth in *Patton* for the waiver of constitutional rights, then the defendant could expressly waive the mandatory provisions of Rule 24(c). *United States* v. *Baccari*, 489 F.2d 274 (10th Cir.), *cert. denied*, 417 U.S. 914 (1974).

The Ninth Circuit has also held that the rule is mandatory and has set forth that failure to object to the court's nondischarge of alternates does not constitute the express agreement necessary to override the mandatory nature of the rule. *United States* v. *Lamb*, 529 F.2d 1153, 1157 (9th Cir. 1975) (en banc).

The Fifth Circuit held that it was not error to allow alternates to go with the jurors while they conducted their deliberations where they were instructed not to participate and "the *procedure* followed with respect to the alternate juror was *explained to and agreed upon* by counsel for both parties before the jurors entered the jury room." *La-Tex Supply* v. *Fruehauf Trailer Div. Fruehauf Corp.*, 444 F.2d 1366, 1367 (5th Cir. 1971). (Emphasis supplied). Later, the Fifth Circuit held that the above procedure is acceptable unless the petitioner can demonstrate a "reasonable probability that the presence of the alternate affected

the jury's verdict." *United States* v. *Allison*, 481 F.2d 468, 472 (5th Cir. 1973). The Sixth Circuit's interpretation of Rule 24(c) allows the rule to be expressly waived by consent of defendant himself. *United States* v. *Davis*, 608 F.2d 698 (6th Cir.), *cert. denied*, 445 U.S. 918 (1980).

A review of the foregoing decisions reveals that a conflict has emerged between decisions of the Second, Fourth, Ninth and Tenth Circuits and decisions of the Third, Fifth and Sixth Circuits. The Second, Fourth, Ninth and Tenth Circuits hold that Rule 47(b) is mandatory. However, the Ninth and Tenth Circuits allow departure from the mandatory dismissal if the criteria set forth in *Patton* for waiver of a jury trial are met.

Moreover, the decisions in the Second, Fourth and Tenth Circuits prohibit substitution of alternates after the jury has begun its deliberations and require discharge of the alternates. The Ninth Circuit, however, will permit the parties by express consent to allow the alternates to be substituted after the jury has commenced its deliberations. The Third, Fifth and Sixth Circuits *will* permit the parties to agree on a basis less than the *Patton* standard to substitute the alternates after the jury has begun its deliberations.

This conflict thus results in a situation which not only departs from the legislative mandate requiring this Court to prescribe uniform general rules for civil actions at law, but further, seriously erodes the sound and uniform application of a rule governing the provision of the constitutionally protected right to a fair, impartial and untainted jury. Rule Making Act of 1934, 48 STAT 1064. The purpose for the Rule Making Act was to enable the federal courts to "unite the general rules prescribed by it for cases in equity with those actions at law so as to secure *one form* of civil action and procedure for both." *Id.* at section 2. (Emphasis supplied). Clearly the form of procedure under Rule 47(b) as exemplified in the above decisional law is not uniform. Any deviation from the interpretation that Rule 47(b) is a mandatory rule requiring discharge of alternates when the jury begins to deliberate

contravenes the requirement that the federal rules must "preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution," 28 U.S.C. §2072, App. C, 56a, as it removes from the court's control the sanctity of the jury process and allows extraneous matters to violate the jury deliberative process.

C. Failure to discharge alternates and substitution thereof during jury deliberations is a denial of a right to trial by a fair and impartial jury.

Until the case is given to the jury to commence its deliberation, the jurors are not allowed to talk about the case among themselves. The notion is that the jurors must keep free and open minds untainted by influences extraneous to the trial process. In a strict sense, the jury does not begin its function as a separate entity until it commences its deliberation. At that point, the jurors are shrouded with "absolute privacy to enable them to engage in full and free debate necessary to the attainment of just verdicts." Notes of Committee on The Judiciary, Senate Report No. 93-1277, 28 §U.S.C. Fed.R.Ev. 606, Comment. Once the deliberations begin "[t]he alternate then [becomes] as any other *stranger* to the proceedings regardless of whether she had been discharged." *United States* v. *Beasley*, 464 F.2d 468, 469 (10th Cir. 1972).

The Court of Appeals of the State of New York, in *People* v. *Ryan*, 19 N.Y. 2d 100, 24 N.E.2d 710, 278 N.Y.S.2d 199 (1966), held that the New York Constitution required that alternates not be substituted after the jury has begun its deliberation as "once the deliberation process has begun it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberation and who had 'cease[d] to function as' jurors." *Id.* at 105, quoting *People* v. *Mitchell*, 266 N.Y. 15, 193 N.E. 445 (1934). Moreover, once the jury begins to deliberate the alternates, unless expressly forbidden by the Court, are free to discuss the case among themselves. Thus, in the instant case, without such a cautionary instruction,

the alternates were not only strangers, *i.e.*, tainted by outside influences, to the deliberative process, they were free to engage in their own separate deliberations.*

Furthermore, the fact of coercion on the alternates or on the juror in the minority (since the jury here had apparently reached a preliminary decision) cannot be gainsayed. If the jurors who previously deliberated have substantially agreed, then the alternates now substituted are faced with substantial coercion. *See United States* v. *Lamb,* 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc). Such a procedure significantly undermines the defendants' right to a mistrial if the jury cannot come to an unanimous decision. *Id. See also* 2 C. Wright, *Federal Practice & Procedure,* §388 at 53 & nn. 16-18. If the alternates reach the same conclusion as the majority then the coercion on the lone juror who cannot in good conscience vote for the plaintiffs is manifest.

The prohibitions against jurors discussing the case among themselves or with strangers during the trial proceeding and against jurors discussing their deliberations with strangers to their deliberations are designed to safeguard an impartial jury trial. 28 U.S.C. §2072. App. C, 56a. By the same token it is a denial of the constitutional right to an impartial jury free from outside influences to permit alternates to participate in jury deliberations once those deliberations have begun. It is respectfully submitted therefore that under the facts of this case when viewed in the context of the historical development of Rule 47(b) and the conflicting Circuit Court opinions, that the issue is ripe for review and calls for the invocation of the supervisory powers of this Court.

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* Query: What role, therefore did the alternate who was discharged at the end of the first day of deliberations play in the ultimate verdict?

II. The Safety Act preempts second collision liability judgments based upon jury imposed standards inconsistent with the Federal Safety Act.

Plaintiffs' only remaining viable cause of action in the instant case is that based on second collision or crashworthiness. *Seese Opinion,* App. A, 7a-10a. The trial court below concluded that the North Carolina Supreme Court if confronted with the issue of crashworthiness would adopt it. *Id.* at 13a-15a. The Third Circuit affirmed this ruling.* *Id.* The result herein is that a manufacturer in manufacturing a forward control van to be driven on North Carolina roads must design a vehicle which will not have its windows break or pop out in a violent rollover in excess of 38 mph on an asphalt highway. This jury-established standard, applied retroactively by the trial court and sanctioned by the Third Circuit, conflicts with the Federal Motor Vehicle Safety Standards (FMVSS) of the Safety Act 15 U.S.C. §1381 *et seq.* (1976) App. C, 50a and is pre-empted thereby or constitutes a denial of due process as the manufacturer is made an insurer of accidents regardless of cause and regardless of compliance or lack of need of compliance with FMVSS.

In the report conducted by the Senate Committee concerning the Safety Act and FMVSS, the committee emphasized the importance of the second collision in the Safety Act.

> The "second collision" the impact of the individual within the vehicle against the steering wheel, dashboard, windshield, etc. has been largely ne-

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* The Third Circuit erroneously concluded under its *Erie* [*Erie Railway Co.* v. *Tompkins,* 304 U.S. 64 (1938)] analysis that the North Carolina Supreme Court would adopt second collision as a cause of action, as the court did not properly analyze the data available to it, but rather opted for the "better law" contrary to the holding of *West* v. *American Tel. & Tel. Co.,* 311 U.S. 223, 236-37 (1940).

> glected. The committee was greatly impressed by the critical distinction between the cause of the accident itself and causes of the resulting death or injury. Here, the design of the vehicle as well as the public willingness to use safety devices, such as seat belts, are critical factors.

S. Rep. No. 1301, 89th Cong. 2nd Sess. 2 (1966), reprinted in [1966] 2 U.S. CODE CONG. & AD. NEWS 2710-11. (hereinafter referred to as "Senate Report" and cited to by page of the 2 U.S. CODE CONG. & AD. NEWS). The Senate Report went on to emphasize that one of the basic needs to be satisfied by the Safety Act was as follows:

> While the contribution of several states to automobile safety *has been* significant, and justifies securing to the states a *consultative* role in the setting of standards, the *primary* responsibility for *regulating the national automotive manufacturing industry must fall squarely on the federal government.*

Id. at 2712. (Emphasis supplied).

The legislative history of the Safety Act in lucid language indicates that the Act was meant to be the regulatory body for promulgating motor vehicle safety standards. The Congressional scheme of promulgating FMVSS under the Safety Act demonstrates that the scheme is pervasive and moreover, specifically designed to ensure that procedural due process is met.*

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* The standards (FMVSS) must be "established" by the Secretary of Transportation through the National Highway Traffic and Safety Administration's (hereinafter referred to as "Agency") "order" and each such standard must be "practicable," "meet the need for motor vehicle safety" and be "stated in objective terms." 15 U.S.C. §1392(a) (Supp. 1979), App. C, 50a. The Administrative Procedure Act, 5 U.S.C. §551 *et seq.* (1976) applies, 15

(Footnote continued on following page)

Notwithstanding the establishment of the standard setting process that results in the FMVSS, manufacturers are, in some instances, compelled under the crashworthy theory to comply with jury-imposed standards which negate compliance with the FMVSS promulgated under the Safety Act.

In the instant case, for example, the Agency, after engaging in the above standard setting process, determined

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(Footnote continued from preceding page)

U.S.C. §1392(b) (1976), App. C, 51a, and each order must specify the standard's effective date, 15 U.S.C. §1392(c) (1976), App. C, 50a-51a. *See* Senate Report, *supra,* at 2715-16. The Agency must consider a number of enumerated factors including whether the standard is "reasonable, practicable and appropriate" for the particular type of vehicle for which it is prescribed, 15 U.S.C. §1392(f) (1976), App. C, 52a-53a. Judicial review is provided, 15 U.S.C. §1394 (1976), App. C, 53a-54a, and even additional evidence may be allowed. *See also* Senate Report, *supra,* at 2715-16. The manufacturers, distributors, and dealers of motor vehicles and motor vehicle equipment, public and private organizations, individuals engaged to a significant extent in the promotion or study of motor vehicle safety and automobile insurance underwriters are expressly afforded an opportunity to participate and to give their input in the standard-setting process.

In the Congressional scheme of promulgating FMVSS under the Safety Act procedural "due process" is very carefully safeguarded. An example of the rational, orderly and procedurally-protective scheme is reflected in *Chrysler Corp.* v. *Department of Transportation,* 472 F.2d 659 (6th Cir. 1972) (judicial review of passive restraint or "airbag" requirement).

It is obvious that if automobile manufacturers are to be charged with an obligation to design cars from the standpoint of collision performance, they need to know *in advance of manufacture* just what must be built into such vehicles. In order to make a manufacturer legally responsible for compliance with a particular safety standard, he first needs to know what that standard is. In the federal standard-setting process involving automobiles, the manufacturer receives adequate notice of what is required of him and an opportunity to be heard on the subject (either through administrative procedures or judicial review.) More importantly, perhaps, he has a definitive and objective criterion by which his legal responsibilities are to be measured.

that the vehicles were exempt from compliance with FMVSS 212 if they were forward control vans such as the Type II at issue herein. Yet, plaintiffs' second collision theory in the instant case that the windows "popped out" thereby causing them to suffer enhanced injuries, and the trial court's rulings on evidence to support that theory negated (1) the thrust of the FMVSS regarding usage of the seat belts to prevent injuries in second collision accidents and (2) the standard-setting process whereby an exemption from compliance with FMVSS was given to forward control vehicles.

A. Seat belt evidence.

As early as 1966 the legislature acknowledged that seat belt usage was a "critical factor" in second collision accidents. Senate Report, *supra,* at 2710-11. In a 1970 Federal Register notification proposing to amend FMVSS 208 to include multipurpose passenger vehicles, trucks and buses, the National Highway Safety Bureau (predecessor of today's NHTSA) stated:

> The specific benefits [of seat belts] include the *prevention of ejection from* the vehicle and the *prevention of injury* resulting from contact with the windshield and interior surfaces of the vehicle.

35 Fed. Reg. 15222 (Sept. 30, 1970) (emphasis added). The views of the agency did not change appreciably when it was later considering mandating airbags or other passive restraints. Seat belts, if used, said the Secretary of Transportation, "can reduce the likelihood of death in severe automobile accidents by roughly 60% and reduce the severity or avoid the occurrence of injuries by 30% to 60%." 41 Fed. Reg. 24072 (June 14, 1976). Even when equipped with airbags cars would still likely require lap belts in order to provide rollover crash protection. *Id.*

The single most important safety device preventing or ameliorating the dangers of ejection is, and according to petitioners' position at trial was, the seat belt. The effec-

tiveness of this safety device has been widely recognized and confirmed by governmental regulation for more than a decade. *See* FMVSS 208, 212 and 219, set forth at 49 C.F.R. §§571.208, .212 and .219 (1980). App. C, 68a-82a. The performance of seat belts as an occupant retention device had been not only accepted and endorsed by the government but proven in simulated test crashes and accident analyses. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). Yet, the trial court, in defiance of the Agency's standard-making process excluded all evidence of the installation of seat belts by petitioners in the accident vehicle as the government approved and industry accepted safety device to protect occupants in a rollover accident.

The trial court's rationale for this ruling was twofold: First, the court relied on a case decided before crashworthiness was defined by either FMVSS or *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), namely *Miller* v. *Miller*, 273 N.C. 268, 160 S.E.2d 65 (1965) and second, on the testimony of defendants' expert that the window retention system was designed without regard to whether occupants wear or do not wear seat belts. The court's rulings were sanctioned by the Third Circuit. *Seese Opinion*, App. A, 13a-19a.

The Third Circuit's holding conflicts with the FMVSS and the Agency's thrust to attempt to increase usage of seat belts. *Cf. Pacific Legal Foundation* v. *Department of Transportation, supra*, 593 F.2d at 1340-41. *See generally* 49 C.F.R. §571.208 to .209 (1980). As to the trial court's first ruling, *Miller* v. *Miller, supra*, was not decided in a second collision context, *i.e.*, where the alleged design defect did not cause the accident, but in a first collision context where the negligent driver caused the accident and where contributory negligence would have vitiated plaintiff's cause of action. If *Miller* is read so broadly, it conflicts with FMVSS. *See Seese Opinion*, App. A, 42a n.15 and surrounding text (Adams, J. dissenting).

As to the trial court's latter ruling, as Judge Adams noted, the testimony of defendants' expert "manifests a position that it was unreasonable to rely upon windows to retain occupants in a rollover accident." *Id.* at 43a. The Department of Transportation, in establishing the standards regarding seat belts, similarly concluded that retention of occupants in rollover accidents could *only* be met by a seat belt system and established a standard for passive restraints. *See Pacific Legal Foundation, supra,* 593 F.2d at 1340-41. However, as the court noted in *Pacific Legal Foundation,* after analyzing the only two passive seat belt systems to protect passengers from the second collision, "riders *must* wear lap belts to guard against injury from lateral impact crashes and *rollovers.*" *Id.* at 1341. (Emphasis supplied). *See* Secretary of Transportation Decision concerning Motor Vehicle Occupant Crash Protection (Dec. 6, 1976). Clearly, in a case regarding ejection, the decision that evidence regarding the provision of seat belts by the manufacturer is inadmissible conflicts with the FMVSS and the Safety Act. In demonstrating the reasonableness of its design from a crashworthy standpoint, the manufacturers must be able to show the availability of seat belts.

B. The exemption from compliance with FMVSS 212.

After engaging in the above standard setting procedure the Department of Transportation promulgated FMVSS 212. By its own terms Standard 212 "does not apply to forward control, walk-in van-type vehicles." This is exactly the vehicle at issue herein. *See also Seese Opinion,* App. A, 42a n.15. If the Department of Transportation, after having engaged in research, development, testing, evaluation and after having invited the public and others to participate in the standard setting process, concluded, in promulgating standard 212, that it should not be applied to forward control vehicles such as the Type II at issue herein, then the court's decision, sanctioned by the Third Circuit, to admit such evidence contravenes FMVSS; and

the jury verdict reached, based on such evidence is a jury-established standard which conflicts with the Safety Act and is preempted thereby.

C. Conflict between FMVSS and jury verdicts or plaintiffs' theories.

Simply put Standard 212 requires vehicles to which it is applicable to retain 50% of the periphery of the windshield in a collision with a fixed barrier at 30 mph if the vehicle does not have a retention system and to retain 75% if it has a retention system. In *Gray* v. *General Motors Corp.*, 434 F.2d 110 (8th Cir. 1970), the plaintiff sued for alleged negligence in failing to install a "pop-out" windshield which allegedly aggravated the facial injuries plaintiff sustained in a crash. However, under FMVSS 212, the windshield mounting is required to be retained in a 30 mph forward crash into a rigid concrete barrier, a standard expressing the view that the windshield should not "pop-out." *See* 49 C.F.R. §571.212 (1980). App. C, 79a-81a. In the instant case, the plaintiffs were driver and passengers who were riding, unbelted, in a Volkswagen Type II van which was exempt from compliance with Standard 212. *Id.* The vehicle was involved in a violent rollover during which the plaintiffs were allegedly ejected through the windshield and side window. Plaintiffs' second collision theory was that the windows "popped out" thereby causing them to suffer enhanced injuries. Which of these standards, *Gray* or *Seese* or FMVSS 212, should the manufacturer follow to "take those steps necessary to minimize potential harm causing defects"? *Seese Opinion,* App. A, 12a. In such a case it would be a "physical impossibility" to comply with both the federal standard and the above conflicting ad hoc standards for that claim.

Similarly, "physical impossibility" arises from conflicting jury-established standards as to the same subject matter whereas the FMVSS prescribe a different performance

standard.* Additionally, a form of "physical impossibility" or its functional equivalent (for example, prohibitive cost) might arise when compliance with a jury-imposed standard in a particular aspect of performance would reuire a redesign that would effectively cause another FMVSS to be violated or a change that could result in a significant danger to the safety of occupants in other kinds of accidents.** Clearly the Safety Act preempts such inconsistent jury established standards.

D. Both the Supremacy Clause and the Safety Act mandate preemption of plaintiffs' crashworthiness theory.

The doctrine of "federal preemption" is rooted in the "Supremacy Clause," Article VI, Clause 2 of the United States Constitution. App. C, 49a. Once it is determined that the federal government has power to regulate in a given area, the key "preemption" question is whether Congress has exercised its legislative power in such a manner as to exclude the states from asserting concurrent jurisdiction

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* Thus, in *Seattle-First National Bank* v. *Talbert*, 86 Wash.2d 145, 542 P.2d 774 (S. Ct. 1975) (en banc) and *Baumgardner* v. *American Motors Corp.*, 83 Wash. 2d 751, 522 P.2d 829 (1974), vehicles were claimed to be "uncrashworthy," because, among other things, the seats remained anchored during the collision and failed to yield. In *Walton* v. *Chrysler Corp.*, 229 So. 2d 568 (Miss. Sup. Ct. 1969) and *Volkswagen of America, Inc.* v. *Young*, 272 Md. 201, 321 A.2d 737 (1974), on the other hand, the claim was that the design was "uncrashworthy" because the seats gave way in the collision. Under FMVSS 207, seats must withstand a certain force under prescribed test conditions and then are permitted to yield. 49 C.F.R. §571.207. App. C, 65a-68a.

** An example of the former is the "pop-out" windshield illustration discussed earlier. Another such example would be a claim that a fuel tank in a given location should be positioned elsewhere to be safer in a particular kind of accident but where such a relocation would make it practicably difficult to comply with the FMVSS that requires fuel tank integrity to be maintained in multiple test collisions from the front, rear and side. *See* 49 C.F.R. §571.301 (1980). App. C, 83a.

over the same subject matter. *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

State activity raising constitutional or "federal preemption" questions most often takes the form of traditional lawmaking, *i.e.*, state statutes, regulations or municipal ordinances. *E.g.*, *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Though less frequently reflected in the cases, state adjudicative rulemaking activity in the form of imposition of tort or common law liability may also violate the Supremacy Clause of the Constitution. In *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), this Court held that a suit and judgment (including an award of damages) under Illinois common law of unfair competition could not be used to prevent copying of unpatented articles since to do so would conflict with the federal patent laws. Because the patent system is one in which "uniform federal standards are carefully used to promote invention while at the same time preserving free competition," (*id.* at 230-31), a state may not extend the life of a patent beyond its expiration either directly (by legislation) or indirectly (by common law remedies). *Id.* at 231.

Because of conflict with the federal regulatory scheme governing patents, the state may not prohibit copying of the article "or award damages for such copying." *Id.* at 233. *See also San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (damages awarded by California courts for activities amounting to a tort under state law conflicted with controlling federal regulation of labor activities and consequently the awards could not stand).

The above makes clear that the Supremacy Clause may require preemption of common law adjudicative remedies and that the same criteria control a preemption analysis whether the object of preemption is a state statute or a common law remedy. *See also Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966).

Federal law preempts the law of other sovereignties:

> when Congress has 'unmistakably . . . ordained,' . . . that its enactments alone are to regulate a part of commerce. . . . This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Jones v. *Rath Packing Co.*, 430 U.S. 519, 525, *reh. denied*, 431 U.S. 925 (1977). Preemption of any state lawmaking activity, either legislative, administrative or adjudicative, is mandated by express congressional command in the instant case. 15 U.S.C. §1392 (d). App. C, 51a-52a.

Preemption may also be implicitly required by the statutory scheme. Where, as here, federal legislation overlaps the traditional police power of the states, preemption may occur if it was Congress' "clear and manifest purpose" to displace state authority. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Thus, a congressional purpose to preempt may be inferred from the pervasive nature of the federal regulatory scheme. *See, e.g., Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 633 (1973) (pervasive federal aviation regulations manifested intent to completely control air traffic and preempted city ordinance). The pervasive nature of the federal regulatory scheme and enforcement machinery promulgated pursuant to the Safety Act warrants the imposition of the doctrine of preemption in the instant case.*

Certainly, with respect to safety design aspects addressed in the federal regulatory scheme, state tort rem-

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* See 49 C.F.R. Part 571, App. C, 61a-64a, which contains many FMVSS relating to safety windshields, padded dashboards, safety restraints and seat belts, safety door latches, energy-absorbing steering wheels and columns, breakaway rear view mirrors, occupant protection, side door strength, seat strength, roof strength, fuel tank integrity and many others.

For fiscal year 1981 NHTSA requested over $355 million from Congress of which $52.3 million was for traffic and motor vehicle safety programs. See BNA, Product & Liability Rptr. 110 (Feb. 1, 1980).

edies that would impose liability for failure to satisfy ad hoc, jury-determined safety design standards at variance with FMVSS are preempted. In an analogous context, this court held that even where there was no basis for inferring a congressional intent to occupy the entire field, tanker safety design standards promulgated pursuant to federal statute preempted overlapping, inconsistent state regulations. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 164-65 (1978). In so doing this Court noted a Senate Report which had analogized the tanker safety design statute to the Safety Act here at issue. *Id.* at 161 n. 9.

The Safety Act has a primary purpose of imposing uniform design standards. This is implicit in the express preemption of §1392(d). The goal of uniform design standards is also made abundantly clear upon perusal of the legislative history.* It is settled that federal policy can be frustrated equally by more stringent state standards than by laxer state standards. *E.g., Jones* v. *Rath Packing Co., supra; Burbank* v. *Lockheed Air Terminal, supra; Ray* v. *Atlantic Richfield Co., supra.*

Whether allowance of such crashworthiness claims as that in the instant case results in silent sufferance of tort liability for negligent design despite compliance with FMVSS, adoption of the most stringent design standard recognized under state crashworthiness law or the "Balkanization" of automotive safety designs adopted by manufacturers, then the state laws stand as obstacles

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* Senate Report, *supra*, at 2720 ("centralized, mass production, high volume character" of the motor vehicle industry "requires that motor vehicle safety standards . . . be uniform through the country"); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) ("uniformity of standards" intended so that public and industry is guided "by one set of criteria rather than a multiplicity of diverse standards"); Senate Report, *supra*, at 2079 ("channel the creative energies and vast technology into a vigorous and competitive effort to improve the safety of vehicles"); *see also, id* at 2712 ("vigorous competition" in development and marketing of safety improvements "must be maintained").

". . . to the accomplishment . . . of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Further, federal exclusion of state law is "inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-43 (1963).

A holding of Safety Act preemption is not impeded by 15 U.S.C. §1397(c) which provides:

> Compliance with any Federal Motor Vehicle Safety Standard issued under this subchapter does not exempt any person from any liability under common law.

In *Douglas* v. *Sea Coast Products,* 431 U.S. 265 (1977) this court considered whether a finding of preemption by a federal licensing statute was precluded by Congress' subsequent express grant of authority to the states in the Submerged Lands Act, 43 U.S.C. §1301-15. The Court held that preemption was justified because the subsequent federal statute expressly reserved federal authority to regulate matters affecting commerce. *Id.* at 284. The "broad language of the Submerged Lands Act" did not alter the preemption effect of the federal licensing statute. *Id.*

Section 1397(c) App. C, 55a and 1392(d) App. C, 51a-52a are not mutually exclusive nor do they cancel each other out: they must be construed *in pari materia.* Accordingly, §1397(c) cannot be interpreted as allowing states to accaccomplish by ad hoc jury determinations of crashworthiness what §1392(d) of the Saftey Act clearly forbids the states to accomplish by enactment. To otherwise interpret §1397(c) would frustrate the unmistakable legislative intent to impose uniform safety design standards embodied in the Safety Act.

It is far more logical and likely that the intended effects of §1397(c), construed in light of §1392(d), are: to pre-

clude a per se defense to a lawsuit; to permit recovery in strict liability for variances from FMVSS existing when the vehicle left the manufacturer; to permit recovery under tort law or warranty principles where the alleged defect concerned an *aspect of design not addressed by FMVSS.*

Thus, on the facts of the instant case, §1397(c) does not alter the preemptive effect mandated by §1392(d) concerning plaintiffs' crashworthiness theory.

Although sufficient precedent exists to consider totally curtailing state tort awards because of federal preemption, this Court may fully wish to consider whether at least a partial curtailment in the crashworthy area is necessary. *See Linn* v. *United Plant Guard Workers, supra,* 383 U.S. at 67. The "preemption" issue is thus squarely presented and ripe for review by this Court. Therefore, the petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN T. DOLAN,
Counsel of Record.

CRUMMY, DEL DEO, DOLAN & PURCELL,
Attorneys for Petitioners, Volkswagenwerk A.G. and Volkswagen of America, Inc.,
Gateway I,
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Supplemental Brief

NO. 81-339

Office Supreme Court, U.S.
FILED
SEP 5 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VOLKSWAGENWERK, A.G., a West German Corporation and VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation,

Petitioners,

vs.

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Respondents.

SUPPLEMENTAL BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN T. DOLAN,
Counsel of Record.

CRUMMY, DEL DEO, DOLAN & PURCELL,
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Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Where a federal court exercising diversity jurisdiction has to decide the law of a state outside and foreign to its circuit, is that court constitutionally required to defer to a definitive ruling on the precise legal issue by a federal Circuit Court of Appeals in whose circuit the state is located and with whose laws the circuit is regularly familiar?

2. Is it error or an abuse of discretion for a foreign Circuit Court of Appeals* to fail to give appropriate deference to a decision made by the Court of Appeals of another circuit familiar with the law of a state within its circuit where the foreign Court's decision on state law relied, in part, on a district court decision later overruled by the familiar Circuit Court of Appeals?

3. Where the Third Circuit Court of Appeals decided in a split opinion that North Carolina law allows "second collision" liability but the Fourth Circuit Court of Appeals unanimously decided North Carolina law to the contrary, expressly rejecting the Third Circuit's view, should not the decision of the Fourth Circuit, which has North Carolina within its territorial limits, be deemed controlling or, minimally, be given considerable weight in order to effectuate *Erie Railway Co.* v. *Tompkins,* 304 U.S. 64 (1938) principles and provide guidance to litigants and courts attempting to discern and apply North Carolina law in diversity cases?

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* The term "foreign Circuit Court of Appeals" is used to describe a circuit which must apply the law of a state not within its circuit while the term "familiar Circuit Court of Appeals" is used to describe a circuit which regularly handles and is familiar with the law of a state within its circuit.

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NO. 81-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VOLKSWAGENWERK, A.G., a West German Corporation and VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation,

Petitioners,

vs.

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinion Below

The Order of the Court of Appeals denying leave to file a second petition for rehearing at issue herein is dated August 20, 1981 and appears in the appendix as Appendix O.

Jurisdiction

The Order of the Court of Appeals was filed on August 20, 1981. See Appendix O, 240a. This supplemental brief in support of petition for writ of certiorari was filed within 90 days thereafter. Jurisdiction to this Court is envoked under 28 U.S.C. §1254(1) (1976). Furthermore, this brief is submitted under United States Supreme Court Rule 22.6.

Federal Constitutional Provisions

The questions presented in this petition involve Article III, Clause 2 of the United States Constitution, which is set forth in Appendix R.

Statement of the Case

On August 21, 1981, petitioners, Volkswagenwerk, A.G. and Volkswagen of America Inc. (hereinafter "Petitioners") filed a Petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit. Immediately prior to the filing the Petition, petitioners became aware of two recent appellate decisions which they deemed potentially dispositive of the litigation. The two decisions were furnished to the Third Circuit by way of a motion for an extension of the stay of the mandate and a motion for leave to file a second petition for rehearing. Appendix O at 234a to 238a (hereinafter "App."). These motions were filed on August 18, 1981. On August 20, 1981, the Third Circuit denied both motions, with Judge Adams dissenting and stating that he would have granted both motions. App. O at 239a to 240a.

The central focus of the motions was that the Third Circuit's admittedly "hazardous" prediction of North Carolina law in this case was contradicted by a recent unanimous Fourth Circuit ruling on the precise legal issue under North Carolina law. Specifically, Petitioners furnished to the Third Circuit a copy of the Fourth Circuit Court of Appeals' decision in *Wilson* v. *Ford Motor Company,* Docket No. 80-1491 (4th Cir. August 14, 1981), in which the Fourth Circuit held that North Carolina law did not permit so-called "second collision" liability and affirmed a summary judgment in favor of the defendant. App. P at 242a to 243a. The issue of North Carolina law involved was critical and dispositive. If North Carolina law is as announced by the Fourth Circuit (a position petitioners have advanced throughout this litigation), the judgment herein must be reversed. The Fourth Cir-

cuit's decision of North Carolina law was especially significant since it expressly considered but rejected the Third Circuit's contrary prediction. *Id.*

Because of the dramatic conflict between the two Circuit Courts, Petitioners also furnished to the Third Circuit below the recent decision of the Second Circuit Court of Appeals in *Factors Etc., Inc.* v. *Pro Arts, Inc.*, Docket No. 80-7692 (2nd Cir. June 29, 1981). There the Court held that:

> Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule.

App. Q at 255a. This very question was squarely placed before the Third Circuit in Petitioners' motion for a second rehearing. The Third Circuit, in denying the motion, clearly disagreed with the decision of the Fourth Circuit in *Wilson* and of the Second Circuit in *Factors*. Thus, there is not only a conflict between the Third and Fourth Circuits with respect to the dispositive legal issue of second collision liability, but further, there is also a conflict among the circuits as to whether the Third Circuit below should have "appropriately deferred" to the Fourth Circuit's decision.

Reasons for Granting the Writ

Under the mandate of *Erie Railway Co.* v. *Tompkins*, 304 U.S. 64 (1938), state law must be applied in diversity actions such as the instant case. The decision by the Second Circuit in *Factors, supra,* is consistent with the proper application of the *Erie* doctrine and conflicts with

the Third Circuit opinion at issue herein. Therefore, the within matter is ripe for review by this Court for the following reasons:

First, this case presents novel issues heretofore unresolved by this Court. As noted by the *Factors* Court, there is "hardly a mention in the appellate reports of the appropriate deference a court of appeals should give to the court of appeals of another circuit" familiar with the state law of a state in its circuit. App. Q at 250a.

Second, there exist conflicts (a) between the Second Circuit (*Factors, supra*) and the Third Circuit (*Seese, supra*) as to whether deference must be given to the familiar circuit's decision on State law by the foreign circuit and (b) between the Fourth Circuit (*Wilson, supra*) and the Third Circuit (*Seese, supra*) as to the substantive law of North Carolina applicable to the same issue in two different diversity actions.

Third, these conflicts are likely to recur because of the numerous federal forums available to diversity litigants and because sometimes state forums under choice of law principles must apply foreign state laws frequently contained only in federal diversity opinions.

Fourth, without a decision by this Court on the issue of deference between foreign and familiar circuits on state law, the policy under *Erie* for uniformity of decisions and predictability of results under state law is severely undermined resulting in conflicting federal decisions. This issue is all the more important since it concerns federal courts applying state law for which there is no resort to the highest court of the state for clarification. Consequently, some guidance must be established by this Court under *Erie* to resolve conflicting federal decisions.

Fifth, a vacuum in which such conflicting decisions can readily occur only fosters the evil sought to be avoided by the *Erie* decision: namely, forum shopping to achieve a result unwarranted by state law.

Sixth, the *Erie* analysis engaged in by the Third Circuit herein is fatally flawed in that the court below relied on

a single federal district court decision in the familiar circuit which was overruled by that same circuit in *Wilson* thereby thwarting the policy of this Court enunciated in *Erie* to achieve uniformity of results. Until a more definitive rule is established by this Court on the issue of "appropriate deference" to the familiar circuit decision. This Court is, in effect, the "court of last resort" to rectify *Erie* conflicts among the circuits as is presented in this case. A decision is also required in the interest of justice. This Court's decision either way will prove dispositive to this litigation and would not require a retrial of this case. At the same time, this Court can provide guidance to federal courts, lawyers, and litigants in this troublesome area. This case presents the issue clearly and it is ripe for review upon submission of full briefs of the parties.

ARGUMENT

POINT I

The prediction of a Court of Appeals in a diversity matter of state law of a state within its circuit on a question of first impression within that state is controlling and should be deferred to by the forum Circuit Court.

In *Factors, supra,* the issue before the Second Circuit Court of Appeals was whether under Tennessee law there was a descendible right of publicity. App. Q at 245a. It was determined by that court that this question was governed by the law of the State of Tennessee whose highest court had not addressed the issue. App. Q at 250a. However, the Sixth Circuit Court of Appeals in a related matter had already determined* that under Tennessee law, there was no descendible right of publicity. *See,*

* The issue herein concerns a decision by the Fourth Circuit subsequent to the decision by the Third Circuit herein. However, this distinction is of no moment, since the matter is still *sub judice. Cf. Vandenbark* v. *Owens-Illinois Co.,* 311 U.S. 538, 543 (1941).

Memphis Development Foundation v. *Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, —— U.S. —— (1980). In view of the fact that the State of Tennessee was located within the jurisdiction of the Sixth Circuit, the Second Circuit addressed the issue of what deference it should give to the decision of the Sixth Circuit in resolving the novel issue of state law confronting it. App. Q at 252a to 255a.

In deciding this issue the Second Circuit sought to foster the "orderly development and authoritative exposition of state law" in diversity jurisdiction matters. App. Q at 252a. Thus, the Court held:

> However our sense of the common law might lead us to resolve the merits of this case were we judges of the Tennessee Supreme Court, as 'outsiders' with respect to Tennessee law, *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974), we should defer to the views of the Sixth Circuit unless we can point to a clear basis in Tennessee law for predicting that the Tennessee courts, when confronted with a case such as this, would conclude that the Sixth Circuit's prediction was incorrect.

App. Q at 255a.

It has long been established that when a novel question of state law arises in a diversity jurisdiction matter, substantial deference should be given to the prediction of state law by a district court judge and circuit court of appeals sitting within the territorial limits of the state in question. *See* J.S. Moore, 1 A. Moore's Federal Practice ¶0.309 [2] at 3121-29 (2nd Ed. 1981). The rationale underlying this approach stems of course from the basic principles established in *Erie*. Under *Erie* and its progeny, the rule is that the outcome in the federal court should be the same as if tried in the state court. Similarly, the outcome should not vary according to the Circuit in which the diversity plaintiff files suit. The conclusion reached by the court in *Factors* is the only result which ensures that diversity litigants will not be unfairly rewarded or penal-

ized for a choice of a forum "unfamiliar" with the law that governs their actions rather than a choice of a forum familiar with such law. To do otherwise denies defendant, who cannot choose the forum, due process of law. *Erie Railway Co.* v. *Tompkins, supra,* 304 U.S. at 74-77.

Bishop v. *Woods,* 426 U.S. 341 (1976) is supportive of the decision reached by the Second Circuit in *Factors, supra.* In *Bishop,* the Court noted:

> We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years. . . .
> . . . The District Court's reading of the ordinance is tenable; it derives some support from a decision of the North Carolina Supreme Court . . . and it was accepted by the Court of Appeals for the Fourth Circuit. These reasons are sufficient to *foreclose* our independent examination of the state-law issue.

Id. at 346-347 (footnotes and citation omitted) (emphasis added). The holding of the Second Circuit in *Factors, supra,* is therefore consistent with, and a natural extension of, this court's analytical approach in dtermining state law in diversity cases. Furthermore, the *Factors* decision serves the salutary purpose of assuring uniformity of decisions within the federal system with respect to questions of state law and precludes the forum shopping for better results in diversity cases, which was so roundly condemned in the *Erie* decision. *Erie Railway Co.* v. *Tompkins, supra,* 304 U.S. at 74-77.

Moreover, and perhaps even more importantly, the holding of the Second Circuit in *Factors, supra,* provides that jurists thoroughly familiar with the statutes and decisions of their jurisdiction are better able to gauge the development of that state's law than jurists removed from the circuit. Such a result reached by this Court will serve to reinforce the mandate of *Erie* that state law be applied in diversity cases. Thus, when the highest court of a state

has not spoken, federal courts can look to the considered judgment of the circuit court within the territorial limits of the state in question for a sound and reasoned prediction of that state's law, enhanced by the experience and knowledge of judges altogether familiar with the law of the state.

It is respectfully submitted that the issue presented by the decision of the Second Circuit in *Factors* is ripe for review by this Court. The opportunity to address this issue was presented to the Third Circuit in the instant matter by the Motion for Leave to File a Second Petition for Rehearing, but that court rejected the opportunity and denied the petitioners' motion. Thus, there is a conflict between the Second and Third Circuits with respect to deference being given to the pertinent circuit court of appeals which has decided a novel question of state law in a diversity case. In the interest of the uniformity of decisions and the constitutional mandate of *Erie,* the petition herein should be granted.

POINT II

The Third Circuit Court of Appeals disregarded the principles of *Erie*.

The Third Circuit agreed with the forum district court herein and determined that, if confronted with the issue, the North Carolina Supreme Court would adopt the theory of "second collision" liability. App. A., 13a-14a. In reaching this conclusion, the Third Circuit recognized that it was embarking upon a "hazardous" course in that the district court had also predicted that North Carolina would adopt the theory of strict liability but was proved to be incorrect by a subsequent decision of the North Carolina Supreme Court in *Smith* v. *Fiber Control Corp.,* 300 N.C. 669, 268 S.E. 2d 504 (1980). App. A., 8a to 12a. It is respectfully submitted that the result reached by the Third Circuit was not only "hazardous" but indeed was incorrect under the principles established by this Court in *Erie* and its progeny,

including *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 236-37 (1940) wherein this Court held that the federal court must ascertain what the state law is and apply it, and in so ascertaining it is bound by intermediate appellate court decisions unless there is "persuasive data" to the contrary. *Id.* at 237. Here, both the trial court and the circuit court failed to follow the principles enunciated in *West* by way of an examination of North Carolina law in an attempt to apply it, but rather, they were primarily persuaded that since 30 other states had adopted second collision liability, that doctrine constituted the better rule, and therefore, North Carolina would adopt it. App. A., 12a-14a.

The Third Circuit did not truly endeavor to determine what the law of North Carolina would be with respect to the issue of "second collision" liability, but rather, it chose to follow the so-called "enlightened rule". App. A., 14a. This flawed approach was aggravated by the Third Circuit's denial of the Motion for Leave to File a Second Petition. App. O. In its opinion below, the Third Circuit relied on a North Carolina federal district court opinion in *Isaacson* v. *Toyota Motors Sales*, 438 F. Supp. 1 (E.D.N.C. 1976) and distinguished or rejected three other North Carolina federal district court opinions going the other way. App. A., 10a-12a. However, the holding by the Fourth Circuit in *Wilson* overrules *Isaacson*. Thus, the Third Circuit's benchmark for determining which way the North Carolina Supreme Court would decide the matter was destroyed by *Wilson*. Yet, inexplicably, the Third Circuit refused to grant the Motion for Leave to File a Second Petition to correct its own error. The only explanation is that the rationale for the Third Circuit's opinion is that it substituted its judgment of what the better law should be rather than examine the pertinent data emanating from North Carolina.

Not only is such an approach in direct contravention of the requirements of *Erie*, but further, it rests upon the untenable position that since the majority of states have adopted this theory of liability, so would North Carolina.

This was the exact same approach taken by the district court herein in predicting that strict liability, which had been adopted by 47 other states, would also be adopted by North Carolina, which prediction proved to be totally inaccurate when the North Carolina Supreme Court rejected the doctrine of strict liability in *Smith, supra.* App. A., 4a-6a.

Moreover, since the divided opinion of the Third Circuit herein, the Fourth Circuit which has the State of North Carolina within its territorial limits squarely confronted the issue of whether North Carolina would adopt the theory of second collision liability. *See Wilson* v. *Ford Motor Co., supra.* App. P at 242a to 243. Thus, the Fourth Circuit affirmed and concurred in the prediction of the North Carolina district court that the North Carolina Supreme Court would not adopt the "second collision" theory of liability.

It is significant to note that in reaching this result, the Fourth Circuit specifically considered the Third Circuit's opinion in *Seese* and directly commenting upon it, rejected it. App. at 243, n. 1. Under *Bishop* and *Factors, supra,* it is respectfully submitted that the Third Circuit should have given conclusive deference to the decision of the Fourth Circuit in *Wilson.* At the very least, the Third Circuit should have considered the Fourth Circuit's unanimous decision on a dispositive issue of law.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition for a Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN T. DOLAN,
Counsel of Record.

CRUMMY, DEL DEO, DOLAN & PURCELL,
Attorneys for Petitioners, Volkswagenwerk A.G. and Volkswagen of America, Inc.,

SUPPLEMENTAL APPENDIX

APPENDIX O

Motions and Order of the United States Court of Appeals for the Third Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR.., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees

VS.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants.

MOTION FOR AN EXTENSION OF THE STAY OF THE MANDATE

Appendix O

To:

HENRY A. WALLACE, ESQ.
Wallace, Chapas & Ober, Esqs.
Suite 1712
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Pittsburgh, Pennsylvania 15219

HAROLD UNGAR, ESQ.
Williams & Connelly
839-17th Street, N.W.
Washington, D.C. 20006

SIRS:

PLEASE TAKE NOTICE, that the undersigned, attorneys for defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc. in the above captioned matter, hereby apply to the United States Court of Appeals for the Third Circuit, pursuant to Fed. R. App. P. 26(b), 27(b) and 41(a) and Chapter X of the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, for an Order extending the stay of the mandate for the reasons set forth in the Affidavit of John T. Dolan, Esq., submitted herewith.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Defendants
By: JOHN T. DOLAN

CERTIFICATION

The undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the

Appendix O

Third Circuit. The undersigned also certifies that a copy of the within Notice of Motion and supporting papers have been sent by Express Mail to counsel for the Appellees, Henry A. Wallace, Esq. and Harold Ungar, Esq.

JOHN T. DOLAN

Dated: August 18, 1981

Appendix O

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees.

vs.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

To:

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Wallace, Chapas & Ober, Esqs.
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Pittsburgh, Pennsylvania 15219

Appendix O

HAROLD UNGAR, ESQ.
Williams & Connelly
839-17th Street, N.W.
Washington, D.C. 20006

SIRS:

PLEASE TAKE NOTICE, that the undersigned, attorneys for defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc. in the above captioned matter, hereby apply to the United States Court of Appeals for the Third Circuit, pursuant to Fed. R. App. P. 40 and Chapters IX and X of the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, for an Order granting leave to file a second petition for rehearing, or for a rehearing en banc, for the reasons set forth in the Affidavit of John T. Dolan, Esq., submitted herewith.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Defendants
By: JOHN T. DOLAN

CERTIFICATION

The undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit. The undersigned also certifies that a copy of the within Notice of Motion and supporting papers have been sent by Express Mail to counsel for the Appellees, Henry A. Wallace, Esq. and Harold Ungar, Esq.

JOHN T. DOLAN

Dated: August 18, 1981

Appendix O

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

vs.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation, and THOMAS S. WEIR, an individual.

Volkswagen of America, Inc., and
Volkswagenwerk, A.G.,

Appellants.

BEFORE: ADAMS, GARTH and SLOVITER, Circuit Judges

The appellants Volkswagen, (*sic*) A.G., and Volkswagen of America, Inc., having moved for an extension of the stay of mandate and for leave to file a second petition for rehearing and it appearing that an order of this panel granted a stay of the mandate to and including August 24, 1981 but provided that no further extensions of time would be granted;

Appendix O

IT IS ORDERED

That the appellants' motion seeking an extension of the stay of the mandate in the above-entitled case and the appellants' motion seeking leave for a second petition for rehearing, be and the same are hereby denied.

Judge Adams would grant both of the appellants' motions.

s/ LEONARD I. GARTH
Circuit Judge

Dated: August 20, 1981

APPENDIX P

Opinion of the United States Court of Appeals for the Fourth Circuit Re: *Fred David Wilson* v. *Ford Motor Company*

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1491

FRED DAVID WILSON, Administrator of the Estate of Michael Glenn Wilson, deceased,

Appellant,

v.

FORD MOTOR COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville.

Woodrow W. Jones, District Judge.

Argued December 1, 1980

Decided August 14, 1981

Before RUSSELL, WIDENER and PHILLIPS, Circuit Judges.

Appendix P

W. Gene Sigmon (Sigmon and Sigmon on brief) for Appellant; Daniel W. Donahue (Womble, Carlyle, Sandridge & Rice on brief) for Appellee.

PER CURIAM:

The sole issue on appeal in this diversity case is whether, under the law of North Carolina, an automobile manufacturer may be held liable for defects in the design and manufacture of a vehicle which neither caused nor contributed to the cause of a collision, but served to exacerbate injuries sustained thereafter. See *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938). This is a question of law, *Dreisonstok* v. *Volkswagenwerk, A.G.,* 489 F.2d 1066, 1069 (4th Cir. 1974), and has not yet been addressed by the Supreme Court of that State (or by the intermediate appellate courts). Thus, it falls to the federal courts to forecast what the North Carolina Supreme Court would hold if presented with this issue. *Commissioner* v. *Estate of Bosch,* 387 U.S. 456 (1967); *McClung* v. *Ford Motor Company,* 472 F.2d 240 (4th Cir. 1973).

The district court, after a careful review of related State cases and of the several and divergent federal court determinations of the issue, ruled that the North Carolina Supreme Court would not hold a manufacturer liable for injuries arising from defects which neither caused nor contributed to the accident.

We find no reversible error in this conclusion and, for reasons sufficiently stated in its Memorandum and Order

of April 9, 1980, the judgment of the district court is AFFIRMED.[1]

[1] In the case of *Seese, et al.* v. *Volkswagenwerk AG, etc.*, No. 77-1413 (3d Cir. 1981), the court, in a divided opinion, predicted that North Carolina would adopt the second crash theory. The dissent argued that even if the second crash theory were applicable, judgment for the plaintiff was subject to error. The rejection by North Carolina, however, in *Smith* v. *Fiber Control Corporation*, 300 N.C. 669, 268 S.E.2d 504 (1980), of the principle of strict liability in tort fortifies our belief that if called upon the Supreme Court of North Carolina would also reject the second crash theory.

APPENDIX Q

Opinion of the United States Court of Appeals for the Second Circuit Re: *Factors Etc., Inc., et al. v. Pro Art, Inc., et al.*

No. 503—September Term, 1980

(Argued December 15, 1980 Decided June 29, 1981)

Docket No. 80-7692

FACTORS ETC., INC. and
BOXCAR ENTERPRISES, INC.,

Plaintiffs-Appellees,

—v.—

PRO ARTS, INC. and
STOP AND SHOP COMPANIES, INC.,

Defendants-Appellants.

Before:

MANSFIELD and NEWMAN, *Circuit Judges,* and
CARTER,* *District Judge.*

Appeal from a judgment of the District Court for the Southern District of New York (Charles H. Tenney,

* The Honorable Robert L. Carter of the United States District Court for the Southern District of New York, sitting by designation.

Judge), 496 F. Supp. 1090, permanently enjoining the appellant from making any commercial use of the name or likeness of Elvis Presley.

Reversed.

WILLIAM J. DAVIS, New York, N.Y. (Charlotte A.W. Pfahl, Alice B. Newman, and Schulman Berlin & Davis, P.C., New York, N.Y., on the brief), *for appellants.*

MICHAEL C. SILBERBERG, New York, N.Y. (Donald F. Schneider, and Golenbock and Barell, New York, N.Y., Arthur Fields, and Ervin, Cohen & Jessup, Beverly Hills, Cal., on the brief), *for appellees.*

NEWMAN, *Circuit Judge:*

The merits of this appeal concern the interesting state law question whether a person has a protected interest in publicizing his name and likeness after his death, or, as the matter has been put, is there a descendible right of publicity?[1] Despite the fascination of this question, what divides the members of this panel and forms the basis for the majority's disposition of this appeal is the more

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[1] *See* Felcher & Rubin, Comment, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death*, 89 Yale L.J. 1125 (1980); Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 Yale L.J. 1577 (1979); Nimmer, *The Right of Publicity*, 19 Law & Contemp. Prob. 203 (1954); Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 U.C.L.A. L. Rev. 1103 (1975); Note, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 Hastings L.J. 751 (1978).

esoteric question, apparently of first impression, concerning the deference a federal court exercising diversity jurisdiction should give to a ruling by a court of appeals deciding the law of a state within its circuit. Believing that conclusive deference should be given, except in certain situations not applicable here, we reverse the judgment of this case.

FACTS

The facts are set forth in this Court's first encounter with this litigation, *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (*Factors I*), and need be recounted only briefly here. During his life, Elvis Presley, the well-known popular singer, formed a Tennessee corporation, Boxcar Enterprises, Inc., and assigned it exclusive ownership of all rights to use for commercial purposes his name and likeness.[2] On August 18, 1977, two days after Presley's death, Boxcar granted to plaintiff-appellee Factors Etc., Inc., a Delaware corporation, an exclusive license for 18 months, renewable at the licensee's option for up to four years, to use Presley's name and likeness in connection with the manufacture and sale of any kind of merchandise. The licensee agreed to pay a royalty of 5% of sales, subject to a minmum royalty for the first 18 months of $150,000, and also subject to certain minimum royalties on specified items, for example, $.08 for each poster.

On August 19, 1977, defendant-appellant Pro Arts, Inc., an Ohio corporation, published a poster displaying

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2 The circumstances surrounding the assignment of rights to Boxcar, a matter of some confusion, happily not of concern to this appeal, are discussed in *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977).

a photograph of Presley and the dates 1935-1977. Pro Arts had purchased the copyright in the photograph from the newspaper photographer who had taken it. Pro Arts marketed the poster through various retailers, including co-defendant-appellant Stop and Shop Companies, Inc., which sold the poster through its Bradlee Stores Division in the Southern District of New York. After communication between Boxcar, Factors, and Pro Arts, Factors brought this suit in the Southern District of New York and obtained a preliminary injunction restraining defendants from manufacturing, selling, or distributing the Presley poster and from making any commercial use of Presley's name or likeness. *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288 (S.D.N.Y. 1977). We affirmed that injunction in *Factors I.*

Contemporaneously with the initiation of this suit, Factors found itself in litigation on another front. The Memphis Development Foundation, an organization formed in Memphis, Tennessee, to construct a bronze statue of Presley in downtown Memphis, sued Factors in the District Court for the Western District of Tennessee to prevent Factors from interfering with the Foundation's efforts to raise funds by selling eight-inch pewter replicas of the proposed Presley statute priced at $25. Factors counterclaimed for an injunction to restrain the Foundation's distribution of the statuettes and secured a preliminary injunction, *Memphis Development Foundation v. Factors, Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977), *aff'd*, 578 F.2d 1381 (6th Cir. 1978) (table). On motion for summary judgment in the Tennessee litigation, Factors obtained a permanent injunction in the District Court. However, the Sixth Circuit reversed, holding that Presley's right of publicity did not survive his death. *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, ____ U.S. ____ (1980).

Appendix Q

Thereafter Factors moved for summary judgment in the New York litigation. Appellants (hereafter collectively "Pro Arts") brought to the District Court's attention the Sixth Circuit's reversal in *Memphis Development*, contending that *Memphis Development* collaterally estopped Factors from asserting that it possessed any exclusive publicity rights to the name and likeness of Presley after his death. Implicitly rejecting this contention, the District Court (Charles H. Tenney, Judge) granted Factors' motion and issued a permanent injunction, from which this appeal has been taken. 496 F. Supp. 1090 (S.D.N.Y. 1980).

DISCUSSION

The District Court, exercising its diversity jurisdiction, 28 U.S.C. § 1332 (1976), was obliged to apply the substantive law of the state to which the forum state, New York, would have turned had the suit been filed in state court. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Curiously, the choice of law issue had received no attention from the parties in this litigation prior to the Sixth Circuit's reversal in *Memphis Development*. Perhaps assuming that the law governing this infringement action was the law of the place of the wrong, as appellees now explicitly contend on this appeal, the parties did not refer to choice of law rules on the prior appeal, and this Court, without discussion, simply observed that the issue of the duration of the right of publicity is "one of state law, more specifically the law of the State of New York," 579 F.2d at 220. That choice of law ruling, made in the course of affirming the preliminary injunction, does not preclude our reexamination of the point on this appeal from a final adjudication of the

case, *see Diversified Mortgage Investors v. U.S. Life Title Insurance Co.*, 544 F.2d 571, 576 (2d Cir. 1976), especially now that the parties have put the choice of law issue in dispute.[3]

Factors not only contends that New York law is applicable as the law of the place of the wrong, citing *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 405 N.Y.S.2d 441, 442, 376 N.E.2d 914 (1978), but also asserts that even if a "significant contacts" test were applied, *see Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963), the significant contacts of this dispute, *i.e.*, those that "relate to the purpose of the particular law in conflict," *Miller v. Miller*, 22 N.Y.2d 12, 15-16, 290 N.Y.S.2d 734, 737, 237 N.E.2d 877, 879 (1968), are with New York. Factors points not only to the sale of the infringing poster, which occurred in New York, but also to the fact that New York, as a center of communications and the locale where the publicity value of many personas has developed, has an interest in ensuring against misappropriation of a celebrity's right of publicity. Against this rather sparse showing, Pro Arts points out that Tennessee is where Presley was domiciled, Boxcar was incorporated, and the agreement between

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[3] Factors contends that Pro Arts is raising the choice of law issue for the first time on appeal, thereby foreclosing Factors from an opportunity to develop in the trial court a factual record demonstrating significant New York contacts. *See DuBreuil v. Stevenson*, 369 F.2d 690 (5th Cir. 1966). However, Pro Arts did call the District Court's attention to the pertinency of Tennessee law on the issue of the existence of a publicity right after Presley's death. (June 19, 1980 tr. 23-24). The point was made in urging that Factors was collaterally estopped to assert possession of a publicity right by the *Memphis Development* decision, an issue we need not resolve in view of our disposition of the appeal. Moreover, it is difficult to imagine what New York contacts Factors could possibly marshal to support a claim that a New York court would apply New York law in deciding the nature of the rights acquired by Factors pursuant to the Boxcar-Factors contract.

Boxcar and Factors was made. Moreover, the latter agreement specifically provides that it is to be construed in accordance with Tennessee law. We think it likely that these facts would persuade a New York court to look to the law of Tennessee. But even if a New York court would apply New York law in considering some elements of Factors' claim, such as the occurrence of an infringement, we feel certain that Tennessee law would be referred to in deciding whether Boxcar had a right of publicity in Presley's name and likeness, after his death, that was capable of being contracted for by Factors. *Cf.* Restatement (2d) of Conflict of Laws (1971) § 147, Comment (i), noting that tort conflicts rules apply to issue of conversion of property, but property conflicts rules apply to whether plaintiff has title to property allegedly converted.

All members of the panel agree that we should turn to Tennessee law to determine what rights the Boxcar-Factors contract conveyed to Factors. We find, as the Sixth Circuit concluded in *Memphis Development,* that Tennessee statutory and decisional law affords no answer to the question. We are thus brought to the issue that divides the panel: whether deference should be accorded to the decision in *Memphis Development.*

Somewhat to our surprise, there has been hardly a mention in the appellate reports of the appropriate deference a court of appeals should give to a decision made by the court of appeals of another circuit on the law of a state within that other circuit. It has frequently been observed that a court of appeals should give considerable weight to state law rulings made by district judges, within the circuit, who possess familiarity with the law of the state in which their district is located. *See* 1A Moore's Federal Practice ¶ 0.309(2) n.28 (collecting cases). The

Supreme Court has expressed similar views concerning state law interpretations by a panel of circuit judges whose circuit includes the relevant state. *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942). But no case appears to have turned on whether one court of appeals should defer to another circuit as to the law of a state within that circuit.[4]

In deciding *Memphis Development*, the Sixth Circuit was expounding Tennessee's version of the common law. It makes no difference that the Court was unable to find any Tennessee decisional law to guide its resolution of the issue before it, leaving it, as Judge Merritt candidly acknowledged, with "no way to assess" the predisposition of the Tennessee courts. 616 F.2d at 958. The Sixth Circuit may have lacked any sure basis for predicting what the Tennessee courts would do and therefore felt obliged to make its decision "in the light of practical and policy considerations, the treatment of other similar rights in our legal system, the relative weight of the conflicting interests of the parties, and certain moral presuppositions concerning death, privacy, inheritability and economic opportunity." *Ibid.* But this recourse to such general considerations did not alter the function that the Sixth Circuit was performing. In adjudicating a state-

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4 In *Waters v. American Automobile Insurance Co.*, 363 F.2d 684, 689 (D.C. Cir. 1966), the District of Columbia Circuit seemed prepared to read Missouri cases to reach a result different from one adopted by the Eighth Circuit, but ultimately rested decision on a recent decision of a state intermediate appellate court, which was precisely in point. In *Peterson v. U-Haul Co.*, 409 F.2d 1174, 1177 (8th Cir. 1969), the Eighth Circuit expressed the view that "Federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties." This view has been labeled erroneous by Professor Moore, 1A Moore's Federal Practice ¶ 0.309(2) n.19, and several circuits, including the Eighth, have relied on the precedential force of their own prior rulings on state law, *id.* at p. 3124-25 and n.25 (collecting cases).

created right in the exercise of its diversity jurisdiction the Court was "for that purpose, in effect, only another court of the State." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). It had no power "to declare substantive rules of common law," *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938); it could only declare the law of Tennessee. "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State . . . ." *Id.* at 79, quoting *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

Of course reasonable minds may differ as to the preferable course that the common law of Tennessee ought to follow on the merits of Factors' claim. The writer would probably uphold a descendible right of publicity, were he serving on the Tennessee Supreme Court, and perhaps if he served on the Sixth Circuit when *Memphis Development* was decided. But the issue for this Court is not which view of the merits is wiser policy; it is whether, and under what circumstances, a ruling by a court of appeals, interpreting the common law of a state within its circuit, should be regarded as authoritative by the other federal courts of the nation. The answer is illuminated by consideration of the functioning of diversity jurisdiction.

One distinct shortcoming of diversity jurisdiction is the interruption of the orderly development and authoritative exposition of state law occasioned by sporadic federal court adjudications. Except in those few jurisdictions permitting a federal court to certify an unsettled question of state law to the state's highest court,[5] a federal court's

[5] *E.g.*, Fla. App. R. 4.61; Md. Code Ann. § 12-601 (1980); Mass. Sup. Jud. Ct. R. 3:21.

decision on state law cannot be corrected, for the benefit of the litigants in the particular case, by the state's authoritative tribunal. As long as diversity jurisdiction exists, this price must be paid. However, the opportunities for federal court departure from the normal paths of state law development should be held to a minimum, for the benefit of both the orderly development of state law and fairness to those subject to state law requirements. Both values are served by recognizing, within the federal system, the authoritativeness of decisions on the law of a particular state rendered by the court of appeals for the circuit in which the state is located. Orderly development is enhanced because the state legislature will know that the decision of the pertinent court of appeals will determine legal rights, unless superseded by a later state supreme court decision. This knowledge will focus state legislative efforts on the appropriateness of a statutory change. Fairness to the public is promoted by making clear that there is a single, authoritative answer to the particular state law issue, instead of leaving the matter subject to the varying interpretations of the courts of appeals for the several circuits.[6] If this Court were to

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[6] Even if uniformity is achieved throughout the federal courts, the possibility remains that the courts of various states, obliged to consider Tennessee law because of their conflicts rules, might reach different predictions of Tennessee law. We think it more likely that state courts would share our interest in uniformity and accept a ruling by a pertinent federal court of appeals, subject to the same qualifications we adopt for ourselves. If in some instances a state court did not do so, that might lessen but would not eliminate the appropriateness of promoting uniform exercise of diversity jurisdiction within the federal court system. And the uniformity achieved for the period after the date of the decision of the pertinent federal court of appeals is not less worthy of achievement simply because prior to that decision other federal courts or courts of other states may have made different predictions about the course of Tennessee law. The possibility of these unavoidable departures from uniformity, just like decisions of federal

disregard the Sixth Circuit's view and declare that Tennessee law recognizes a descendible right of publicity, what standard of conduct should guide Tennessee residents endeavoring to determine whether their publicity rights are to be valued only for a lifetime or beyond? Of course, lawyers frequently have to advise clients concerning unsettled issues of law, but the exercise of diversity jurisdiction should not add to their uncertainty. Diversity jurisdiction, especially in its post-*Erie* incarnation, should not create needless diversity in the exposition of state substantive law. Even though the decision of the pertinent court of appeals may be revised by a subsequent state supreme court ruling, a state court will normally have the option of making such a ruling prospective only, thereby protecting any rights bargained for in reliance on the ruling of the pertinent court of appeals. That option would make little sense if the authoritative state court ruling came after divergent rulings had been made by several courts of appeals.

We need not and do not conclude that the state law holding of the pertinent court of appeals is automatically binding upon the federal courts of all the other circuits. The ultimate source for state law adjudication in diversity cases is the law as established by the constitution, statutes, or authoritative court decisions of the state. A federal court in another circuit would be obliged to disregard a state law holding by the pertinent court of appeals if persuaded that the holding had been superseded by a later pronouncement from state legislative

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or other state courts rendered before an authoritative ruling by the pertinent state's highest court, is an insufficient reason to create a needless departure from uniformity during what may be an extended period beginning after a decision by the pertinent federal court of appeals and ending, if at all, only in the event of a contrary decision by the pertinent state's highest court or legislature.

or judicial sources, *e.g.*, *Waters v. American Automobile Insurance Co.*, 363 F.2d 684, 689 (D.C. Cir. 1966), or that prior state court decisions had been inadvertently overlooked by the pertinent court of appeals. Neither circumstance exists in this case. Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule. However our sense of the common law might lead us to resolve the merits of this case were we judges of the Tennessee Supreme Court, as "outsiders" with respect to Tennessee law, *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), we should defer to the views of the Sixth Circuit unless we can point to a clear basis in Tennessee law for predicting that the Tennessee courts, when confronted with a case such as this, would conclude that the Sixth Circuit's prediction was incorrect.[7] Since we are unable to find any such indication in Tennessee law, we accept *Memphis Development* as controlling authority and conclude that after Presley's death, Boxcar had no right of publicity in Presley's name and likeness to convey to Factors.[8]

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[7] As it happens, the author of *Memphis Development* is a distinguished member of the Tennessee bar, whose sense of what may be expected of the Tennessee Supreme Court surely surpasses our own. But since Judge Merritt's opinion so emphatically disclaims any basis for predicting how Tennessee will resolve the issue on the merits, we prefer to determine the authoritativeness of *Memphis Development* with regard to the territorial scope of the Sixth Circuit, rather than the heritage of the opinion's author.

[8] In view of our disposition of the appeal, deferring, as a matter of *stare decisis* to the Sixth Circuit's interpretation of Tennessee law, we

For these reasons the judgment of the District Court is reversed.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent. I agree with the majority that, despite the contrary assumption of all parties in *Factors I*, New York conflict of laws analysis would call for the application of Tennessee law to determine if Elvis Presley's right of publicity survived his death. However, with the utmost of respect for our distinguished and able colleagues on the Sixth Circuit, I see no warrant, if we disagree on the merits, for blindly following its decision in *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, ____ U.S. ____ (1980), any more than we would defer to the decision of any other circuit court with which we might, as has occurred on numerous occasions, disagree or conflict. The reasoning of *Memphis Development* is not in any way derived from the local law of Tennessee. Its result is inconsistent with that of nearly every other case which has considered the issue,[1] including the Sixth Circuit's own

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need not consider Pro Arts' other contentions, which include claims that the judgment in *Memphis Development* collaterally estops Factors from asserting a descendible right of publicity, that if New York law applies, New York would not recognize such a right, and that federal copyright law preempts application of state law purporting to protect such a right. Nor need we consider whether the law of a state recognizing a right of publicity may be enforced nationwide, or only within that particular state. *Cf. Goldstein v. California*, 412 U.S. 546 (1973).

[1] Decisions holding that the right of publicity will survive death include *Hicks v. Casablanca Records*, 464 F.Supp. 426 (S.D.N.Y. 1978); *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977) (companion to the Pro Arts case which was affirmed by us in *Factors I*); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836

prior ruling on the preliminary injunction issued by the district court in *Memphis Development* and our opinion in *Factors I*. It is also contrary to all current views of scholarly commentators on the subject.[2]

The majority starts with the proposition that deference is owed to the "interpretations" (Maj. opin., p. 6) by a federal court of the law of a state within its jurisdiction, a principle with which I find no need to disagree. However, it then states that the "issue for this Court . . . is whether, and under what circumstances, a ruling by a court of appeals, interpreting the common law of a state within its circuit, should be recognized as authoritative by the other federal courts of the nation." (Maj. opin., p. 8). With this statement of the issue I must disagree. Here there was *no interpretation* of *any* Tennessee law by the

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(S.D.N.Y. 1975). The position of the California Supreme Court is somewhat unclear. In *Lugosi v. Universal Pictures*, 603 P.2d 425, (1979), and *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, (1979), the majority of the Court held that the rights of publicity involved in those cases did not survive the death of the individuals in question. But it has been suggested that the ruling in *Lugosi*, on which *Guglielmi* was in turn based, depended on the finding that Bela Lugosi had not exploited his right during life. See *Lugosi, supra*, 603 P.2d at 447 n.33 (Bird, C.J., dissenting); Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commerical Life After Death?*, 89 Yale L.J. 1125, 1126 n.5 (1980) ("Felcher & Rubin II"). Without deciding whether or not this reading of *Lugosi* is justified, it is clear that any requirement of exploitation during life is fully met in this case. *See Factors I, supra*, 579 F.2d at 222 n.11; note 4 *infra*.

2 See, e.g., Felcher & Rubin II, *supra*; Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 Yale L.J. 1577 (1979) ("Felcher & Rubin I"); Pilpel, *The Right of Publicity*, 27 Copyright Soc'y Bull. 249 (1980) ("Pilpel"); Note, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 Hastings L.J. 751 (1978); Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 Brooklyn L. Rev. 527 (1976); Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 U.C.L.A. L. Rev. 1103 (1975). And see additional authorities collected in *Lugosi, supra*, 603 P.2d at 446 n.30 (Bird, C.J., dissenting).

Sixth Circuit, only a declaration of what that court thought would be a preferable general common law rule for that state. The issue before us, therefore, is whether a federal court of appeals, called upon to anticipate what general common law rule with respect to a legal question might be appropriate for a state having no law whatsoever on the subject, must adhere to the diversity decision of a sister federal court of appeals within whose boundaries the state is located. Resolution of this issue requires us to look into the reasoning behind the policy of deference which the majority would apply and decide whether it is to be applied mechanically on a geographical basis or is instead subject to any limitations.

The weight given by higher federal courts to state law rulings made by federal judges sitting in that state results from the supposed greater familiarity that such a judge will have with the local law and the methods and tendencies of the state courts. As Wright states:

> "As a general proposition, a federal court judge who sits in a particular state and has practiced before its courts may be better able to resolve complex questions about the law of that state than is some other federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts have frequently voiced reluctance to substitute their own view of the state law for that of the federal judge. As a matter of judicial administration, this seems defensible." C. Wright, *Federal Courts* § 58 at 271 (3d ed. 1976) [footnote omitted].

To a lesser extent a federal court of appeals might conceivably be considered to have more familiarity with the law of a state within its boundaries than would

another federal court of appeals. Even this premise is open to serious question, however, for a number of reasons. Unlike a state court or a federal district court within a single state, the court of appeals of a circuit in which several states are located, which disposes of diversity appeals as only a small percentage of its business, is not likely to gain any special familiarity with the law of one of the states within its boundaries. The Sixth Circuit, for instance, physically encompasses seven different states. Of 1,823 appeals filed with it in 1980, only 212, or 11.6% (compared with an average for all circuits of 12.5%) were diversity suits and these originated not solely from Tennessee but from all seven states. See 1980 Annual Report of the Director, Administrative Office of the United States Courts, Table A-12.

These facts weaken and, indeed, may even destroy the assumption that the able Sixth Circuit has some special knowledge or expertise in Tennessee law to which deference must be paid. In this case, for instance, it would be more logical to assume that, if familiarity with a particular state's law is to be the standard for deference, the United States district judge for the Western District of Tennessee, Judge Harry W. Wellford, who in a well reasoned opinion held Elvis Presley's property right in his name and image for commercial purposes to be descendible, see 441 F. Supp. 1323 (W.D. Tenn. 1977), had superior expertise with respect to Tennessee law. On the issue before us *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942), cited by the majority, is of no assistance for the reason that there the circuit court merely affirmed the "interpretation placed upon purely local law by a Michigan federal judge of long experience," *id.* at 281. Here, in contrast, the Sixth Circuit did not affirm Judge Wellman's decision, but reversed it.

Appendix Q

Moreover, it is perfectly clear that the Sixth Circuit's decision in fact in no way depended on existent local law or methods. The opinion makes no effort, as is sometimes done, to determine what other states the Tennessee courts tend to look to, *cf. Yost v. Morrow*, 262 F.2d 826, 828 n.3 (9th Cir. 1959); *Wilmington Trust Co. v. Mutual Life Insurance Co.*, 76 F. Supp. 560 (D. Del. 1948), much less to be guided by analogous principles of Tennessee law, *cf. Winston Corp. v. Continental Casualty Co.*, 508 F.2d 1298 (6th Cir. 1975). Instead, it expressly states at the outset that,

> "Tennessee courts have not addressed this issue directly or indirectly, and we have no way to assess their predisposition. Since the case is one of first impression, we are left to review the question in the light of practical and policy considerations, the treatment of other similar rights in our legal system, the relative weight of the conflicting interests of the parties, and certain moral presuppositions concerning death, privacy, inheritability, and economic opportunity." 616 F.2d at 958.

It then relies on John Rawls' *A Theory of Justice* (1971) and the Restatement of Torts in evaluating these general considerations. Clearly, familiarity with Tennessee law and practice was of no consequence in the Sixth Circuit's endeavor. We, however much "outsiders" (Maj. op., p. 10), are as fully qualified effectively to "declare" Tennessee law in such fashion as our sister circuit.

If under these circumstances we were to bow to the Sixth Circuit's declaration of Tennessee law, it would have to be for reasons other than those underlying the usual deference given to federal judges who are experienced in the local law and practice of states located

within their boundaries. The majority seeks to find such a basis in the overall "functioning of diversity jurisdiction" (Maj. op., p. 8). First it argues that recognizing the authoritativeness of the Sixth Circuit's ruling would enhance the "orderly development of state law" (Maj. op. pp. 8-9). But our refusal to be bound by the Sixth Circuit here would not affect the development of Tennessee law at all. It is conceded as a matter of settled law that any Tennessee court decision or state legislation would wipe out the future significance of both *Memphis Development* and our decision. Moreover, the notion that consistency among the circuits will better "focus state legislative efforts on the appropriateness of a statutory change" (Maj. op., p. 9) is speculative at best and perhaps ill founded. If Tennessee constituents were laboring under conflicting federal court declarations of rights and duties, the legislature would be more likely to act sooner than if all decisions were consistent.

Second, while noting that lawyers must frequently advise clients concerning unsettled issues of law, the majority argues that failure to follow *Memphis Development* would promote uncertainty and "create needless diversity in the exposition of state substantive law" (Maj. op., p. 9). This ignores the fact that our development and formation of lasting rules of common law depends heavily on healthy differences of opinion. Soundness must not be sacrificed on the altar of consistency. If two members of this panel would "probably uphold a descendible right of publicity, were [they] sitting on the Tennessee Supreme Court" (Maj. op., p. 8), and the third would certainly do so, I think we should so hold rather than retreat behind unsupportable deferential niceties.

Even the consistency achieved under the majority's rule is fortuitous and arbitrary. Had the *Memphis Develop-*

ment case arisen, for example, in the Ninth Circuit and had that circuit, without reference to Tennessee law or practice, declared that Tennessee law should not allow descendibility, would we be required to follow that version unless we could prove it wrong on some local basis overlooked by the Ninth Circuit? Apparently the majority, which would "determine the authoritativeness of *Memphis Development* with regard to the territorial scope of the Sixth Circuit" (Maj. op., p. iii n.7), would agree that such a Ninth Circuit decision would be entitled to no more weight than the usual persuasive authority of a sister circuit with which, for good reason, we might disagree. The only difference here, where the Sixth Circuit eschewed any Tennessee law basis for its declaration, is that its physical geography includes that state. In my view the lack of logic behind the majority's geographical reasoning is further demonstrated by the fact that if we had stated our holding in *Factors I* to be a declaration of our view of Tennessee law, which we would certainly have done if the parties had not at that time agreed that New York law governed, the Sixth or any other circuit would have been free to take a contrary view and thus create the very inconsistency which the majority seeks to avoid.

In the unusual situation here, where an initial court of appeals diversity declaration is in no way derived from the law or practice of the state and interprets no existing state law, we should feel free to reach a different result if sound reasons recommend it, regardless of the unpersuasive views of the sister circuit from which the initial declaration emanated. Where, as here, the Sixth Circuit itself had no Tennessee law basis for its choice and we are persuaded that other reasons dictate a contrary decision (or prediction), there is no logical justification for a rule that would permit us to depart from the Sixth Circuit's

views only upon a showing of "a clear *basis in Tennessee law* for predicting that the Tennessee courts . . . would conclude that the Sixth Circuit's prediction was incorrect" (p. 10) [emphasis added].

Turning to the merits, sound principles commend a different result from that reached in *Memphis Development* on the issue of whether Elvis Presley's right of publicity survived his death.[3] Because the issue was fully addressed in *Factors I* and because the discussion there is consistent with the vast majority of other authorities considering the problem, see notes 1 & 2 *supra,* I will not rehash at length the elements supporting the *Factors I* result. The gist of the reasoning is that the right of publicity involved here is in the nature of a valuable property right, representing the fruits of an individual's investment in the commercial development of the use of his personality. It differs from a mere right of privacy, which is purely personal in nature and hence only protected from invasion as long as the individual lives. Where the publicity right is developed through commercial investment and exploitation of the individual during his lifetime, it should be treated just the same as any other intangible property right owned by him and be devisable or descendible at death. Further, the public policy of providing incentives for individual enterprise and investment of capital and energy argues for allowing an individual to pass the fruits of his labors along to other after his death. To maintain, as *Memphis Development* did, that "leaving a good name to one's children is

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[3] In Felcher & Rubin II, *supra,* at 1132 n.30 it is suggested that the overall result in *Memphis Development* "may be justifiable on other grounds, however. The statue of Presley, itself, being readily characterized as art, not merchandise, is protected by the First Amendment, and is outside the scope of publicity rights. . . . Replicas of the statue could conceivably fall within the same protected category."

sufficient reward in itself for the individual," 616 F.2d at 959, is "rather harsh on those who have invested their efforts in their name, rather than in the stock market, and constitutes a rather heavy burden to impose on creativity." Felcher & Rubin II, *supra*, at 1132.

The parade of horrors conjured by the Sixth Circuit in *Memphis Development* to resist this reasoning is unreal. First, merely being a public figure (e.g., Gandhi, Napoleon, Revere, or the others mentioned at 612 F.2d at 959) is not enough to create a descendible property right. That right exists only by virtue of the individual's *commercial development*[4] of his persona and is limited to *commercial* products. Second, it is not analogous to "titles" and "offices," referred to by the Sixth Circuit, which are not alienable by law and not the result of commercial development any more than are "trust," "friendship" or "enmity," also referred to by that court. *Id.* Third, there are several answers to the Sixth Circuit's concern over how long the property interest lasts after the death of the individual and whether it is taxable. As a practical matter

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4 The question of whether or not this factor is essential to survival of the right was reserved as unnecessary to the decision in *Factors I*. See 579 F.2d at 222 n.11. I would require proof of some form of exploitation along the lines outlined by the district court in *Hicks*, *supra*, 464 F.Supp. at 429:

> ". . . it would appear that a party claiming the right must establish that the decedent acted in such a way as to evidence his or her own recognition of the extrinsic commercial value of his or her name or likeness, and manifested that recognition in some overt manner, e.g., making an *inter vivos* transfer of the rights in the name *(Factors)*, or posing for bubble gum cards (see *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816, 74 S.Ct. 26, 98 L.Ed. 343 (1953))."

See Felcher & Rubin I, *supra*, at 1613-20 and Felcher & Rubin II, *supra*, at 1130-31, for arguments in support of an even sterner application of this requirement. But cf. *Lugosi*, *supra*, 603 P.2d at 447 n.33 (Bird, C.J., dissenting); Pilpel, *supra*, at 257.

the ability to continue to exploit most commercially developed personalities through the sale of products after their death will last but a few years at most, diminishing because public interest in purchasing the products will decline. Further, limits could be placed on the duration of the right by analogy to the copyright statute. See *Lugosi v. Universal Pictures,* 603 P.2d 425, 446-47 (1979) (Bird, C.J., dissenting). Whether the property right is taxable to the individual's estate will depend on interpretation of the Internal Revenue Code, but there is every indication that receipts from the sale of products after death will be taxable to the seller as gross income. Fourth, free speech would not be inhibited by continuing to restrict the sale of such products only to licensees even after death. A biography, documentary or news article would not be the kind of merchandise covered by the right of publicity.[5] Just as it is during an individual's life, the right can be treated with the flexibility needed to avoid genuine conflicts with First Amendment freedoms. *Compare Paulsen v. Personality Posters, Inc.,* 59 Misc.2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (protecting a Pat Paulsen for President poster as newsworthy), *with Factors I, supra,* 579 F.2d at 222 (rejecting claim that the In Memory poster was privileged as celebrating a newsworthy event).[6]

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5 Indeed, even "fictionalized" uses of public figures' names or lives in commercial books or movies, though not qualifying as biography, may be protected by the First Amendment. See *Hicks, supra; Guglielmi, supra* (Bird, C.J., concurring). I leave the merits of this issue for a case which presents it.

6 In her dissent in *Lugosi,* again reaching a question not addressed by the majority, Chief Judge Bird said:

> ". . . I am sensitive to the fact that enforcement of the right of publicity may conflict with freedom of expression in some cases. However, such a conflict is not presented in this case. Plaintiffs

The above reasons make the *Factors I* approach the appropriate rule for Tennessee just as for New York, and I am satisfied that they would persuade the Tennessee courts, if faced with the issue, to follow the majority rule and hold that Elvis Presley's right of publicity survived his death. Additionally, it would be rational for the Tennessee courts to adopt a policy enhancing the continued growth of Nashville and Memphis as centers for the lives and activities of music industry personalities. The *Factors I* rule obviously promotes this, while the *Memphis Development* rule threatens it.

Having concluded that as a matter of Tennessee common law the right of publicity asserted by Factors in this case should be held to survive Presley's death, I address certain of Pro Arts' other arguments against affirmance, which the majority, because of its decision on deference grounds, does not consider (Maj. op. p. iii n.8). Appellees contend (1) that Factors is collaterally estopped by the *Memphis Development* decision from maintaining this suit; (2) that federal copyright law preempts the state law of publicity in this area, and (3) that the apparent nationwide scope of the injunction issued against Pro Arts by the district court is improper. In my view none of these additional points calls for reversal of the judgment below. The first claim is that *Memphis Development*, decided more than four months prior to entry of the judgment appealed from here, created a defensive issue preclusion against Factors because the dispositive issue in that case, as here, is whether under Tennessee law Presley's right of

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challenged Universal's licensing of Lugosi's likeness in his portrayal of Count Dracula in connection with the sale of such objects as plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods. Such conduct hardly implicates the First Amendment." 603 P.2d at 449.

publicity, transferred to Factors, survived his death and this issue was decided by the Sixth Circuit adversely to Factors after a full and fair opportunity for Factors to litigate the issue. With the abandonment of the mutuality of estoppel requirement in New York, *Schwartz v. Public Administrator,* 24 N.Y.2d 65, 70, 298 N.Y.S.2d 955, 959 (1969), and in the federal system, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971), Pro Arts asserts that Factors is bound by the adverse *Memphis Development* ruling and may not relitigate it here.

Under ordinary circumstances, *Memphis Development,* even if erroneously decided, might have a preclusive effect. But application of issue preclusion in a suit against different parties is not automatic; it requires weighing of policy considerations, a process left largely to the district court's discretion, *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979); Restatement (Second) of Judgments § 88 (Tent. Draft No. 2) (in determining whether to invoke collateral estoppel against a litigant the court may take into account "other circumstances [which] make it appropriate that the party be allowed to relitigate the issue"). In this litigation the policies behind collateral estoppel are not served by using the *Memphis Development* decision as a bar.

This is not a case where the plaintiff is simply trying, by switching adversaries and bringing a new suit, to relitigate issues already lost, a course which is to be discouraged because of the needless waste involved in multiple litigation. Indeed, *Memphis Development* is not really a *prior* determination at all. The present case was actually begun first. Both suits then proceeded simultaneously. Further, the present suit was the first and only one brought by the plaintiffs. The Memphis Development

Foundation thereafter sued Factors in the Western District of Tennessee for a declaratory judgment. Factors counterclaimed for a preliminary injunction on the basis of our earlier decision. This relief was granted and the injunction was even affirmed by the Sixth Circuit, which changed its mind only after permanent relief had been granted by the district court in Tennessee. Our own circuit having first had jurisdiction over the issues and having actually adjudicated them for preliminary injunction purposes, the refusal to apply collateral estoppel below in this case cannot be said to permit *re*litigation. Moreover, the issue here may be seen as one of pure law. Application of any type of collateral estoppel to such an issue is questionable. See *McGrath v. Gold,* 36 N.Y.2d 406, 369 N.Y.S.2d 62 (1975); Restatement (Second) of Judgments § 88(1) (Tent. Draft No. 3).

Pro Arts' next contention, that in view of its valid copyright in the In Memory poster the federal copyright statute preempts Factors' state law publicity rights, was fully discussed and rejected by the district court. I agree with Judge Tenney's conclusion that the right protected here is not equivalent to any within the general scope of federal copyright law and so is not preempted by the 1909 Act, as interpreted in *Goldstein v. California,* 412 U.S. 546 (1973), which controls this case. It would likewise not have been preempted under § 301 of the new 1976 Act, 17 U.S.C. § 301, if the events had occurred after 1978.

The right of publicity protects an interest which copyright does not. That interest is the individual's ability commercially to maintain and exploit his fame and persona. Copyright merely protects the holder from the taking of specific expressions or arrangements he or she had created. The right of publicity, on the other hand, protects against the unauthorized appropriation of an

individual's very persona which would result in unearned commercial gain to another. If this right is not the equivalent of a copyright interest during the person's life (as Pro Arts concedes) it is equally not the equivalent after he has died and it has been devised. Other courts which have considered the preemption argument in this exact context have reached the same conclusion as that arrived at by the district court here. See *Apigram Publishing Co. v. Factors Etc., Inc.*, Civ. No. C78-525 (N.D. Ohio July 30, 1980); *Lugosi, supra*, 603 P.2d at 448 (Bird, C.J., dissenting) (issue not reached by majority opinion).

Finally, with certain limits, I would allow the district court's relief to extend nation-wide. The issue here on the merits is whether or not Elvis Presley's right of publicity was devisable. Having concluded that it is, I would not fragmentize or qualify it by holding that it is to be recognized only in certain of our 50 states and not in others, depending on the local rule of the state. *Cf. Goldstein, supra*, 412 U.S. at 558. To do so would be to promote multiple litigation, the very evil against which estoppel is directed. On the other hand, whether certain acts by a defendant amount to an infringement of that right in a state might depend on the local law of the jurisdiction where the wrong occurred. See, in connection with the tort of unfair competition, *Purcell v. Summers*, 145 F.2d 979, 989 (4th Cir. 1944); 4 Callman, *Unfair Competition, Trademarks and Monopolies* § 93.2 at 424; 1A Pt. 2 *Federal Practice*, Par. 0.311[1-1] at 3170 ("Some state courts will consider the law of each state where the wrong occurred.") I would therefore allow a defendant to show that conduct considered to be infringing in one state would not be so held under the rule of other states. The injunction could then be tailored accordingly. In any

event, the practical likelihood of such a problem is not shown.

For the reasons outlined I believe Factors did have a valid and enforceable property right in the commercialization of Presley's persona and would therefore affirm the judgment of the district court granting it relief.

APPENDIX R

Relevant Statutes

United States Constitution

ARTICLE III—THE JUDICIARY

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX S

Affidavit of John T. Dolan

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET No. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees,

vs.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

JOHN T. DOLAN, being duly sworn according to law, upon his oath, does depose and say:

1. I am a partner in the firm of Crummy, Del Deo, Dolan & Purcell, attorneys for the defendants in the above

captioned matter, and I am fully familiar with all matters in this case.

2. On April 27, 1981, this Court filed an Opinion in this matter which, *inter alia,* affirmed the verdict of the jury below with respect to certain of its findings. On June 26, 1981, this Court denied the defendants' petition for a rehearing (en banc).

3. On July 31, 1981, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, this Court ordered that the mandate in the above captioned matter be stayed until August 24, 1981. This Order also provided that no further extensions would be granted.

4. While it is recognized that the aforesaid Order stated that no further extensions of the stay of the mandate would be granted, it is respectfully submitted that due to certain very recent and important developments, a further extension of the stay should be granted at the time until September 23, 1981, the date upon which a writ of certiorari must be filed with the United States Surpeme Court.

5. In this Court's Opinion of April 27, 1981, it was decided that if the North Carolina Supreme Court were to confront the issue, it would adopt the theory of second collision liablity. It was solely on this basis that this Court affirmed the judgment rendered below in favor of the plaintiffs. Indeed, the only other basis for plaintiffs' judgment consisted of a strict liability claim which was reversed by this Court on the basis of the North Carolina Supreme Court's decision in *Smith* v. *Fiber Control Corp.,* 300 N.C. 669, 268 S.E. 2d 504 (1980), which decision rejected the adoption of strict liability.

Appendix S

6. On August 14, 1981, the Court of Appeals for the Fourth Circuit was confronted with the single issue of whether under North Carolina law a cause of action existed under the theory of second collision liability in the case of *Wilson* v. *Ford Motor Company,* Docket No. 80-149 (4th Cir. Aug. 14, 1980). The *Wilson* court held that:

> The district court, after a careful review of related State cases and of the several and divergent federal court determinations of the issue, ruled that the North Carolina Supreme Court would not hold a manufacturer liable for injuries arising from defects which neither caused nor contributed to the accident.
>
> We find no reversible error in this conclusion and, for reasons sufficiently stated in its Memorandum and Order of April 9, 1980, the judgment of the district court is AFFIRMED.

Id. at p. 2. Thus, the Fourth Circuit affirmed and concurred in the prediction of the district court that the North Carolina Supreme Court would not adopt the second collision theory of liability.

7. Is is significant to note that in reaching this result, the Fourth Circuit did consider this Court's Opinion in the above captioned matter and commented upon it as follows:

> In the case of *Seese, et al.* v. *Volkswagenwerk AG, etc.,* No. 77-1413 (3d Cir. 1981), the court, in a divided opinion, predicted that North Carolina would adopt the second crash theory. The dissent argued that even if the second crash theory were applicable, the judgment for the plaintiff was subject to error.

Appendix S

> The rejection by North Carolina, however, in *Smith* v. *Fiber Control Corporation*, 300 N.C. 669, 268 S.E. 2d 504 (1980), of the principle of strict liability in tort fortifies our belief that if called upon the Supreme Court of North Carolina would also reject the second crash theory.

Id. at p. 3. Attached hereto made part hereof as Exhibit A is a copy of the Fourth Circuit's Opinion in *Wilson*.

8. Clearly, the Fourth Circuit in reliance on *Smith, supra*, and the decisional law of North Carolina rejected the prediction of this Court as to what the Supreme Court of North Carolina would do if confronted with the issue of second collision liability. The significance of the *Wilson* decision is twofold. First of all, the decision in *Wilson* represents the considered judgment of both the district court as well as members of the Fourth Circuit with respect to the law of North Carolina on the issue of second collision liability. Both of these forums had available to them all of the decisional law in North Carolina, including *Smith, supra*, and only after considering that decisional law was a reasoned judgment made as to what the Supreme Court of North Carolina would do if confronted with this issue. Secondly, the State of North Carolina is within the jurisdiction of the Fourth Circuit Court of Appeals. It was recently decided in *Factors Etc., Inc.* v. *Pro Arts Inc.*, Docket No. 80-7692 (2nd Cir. June 29, 1981), that a prediction by a Circuit Court of Appeals of a novel question of state law of a state within its its jurisdiction should be controlling except under certain circumstances which are not relevant here. Specifically, the *Factors* Court held:

> Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps, always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule. However our sense of the common law might lead us to resolve the merits of this case were we judges of the Tennessee Supreme Court, as "outsiders" with respect to Tennessee law, *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974), we should defer to the views of the Sixth Circuit unless we can point to a clear basis in Tennessee law for predicting that the Tennessee courts, when confronted with a case such as this, would conclude that the Sixth Circuit's prediction was incorrect.

Id. at p. 4028. Attached hereto made part hereof as Exhibit B is a copy of the decision in *Factors*.

9. Thus, two critical issues are clearly ripe for decision by this Court with respect to the instant case. Initially, there is the clear conflict which exists between this Court and the Fourth Circuit in *Wilson* with respect to the prediction that North Carolina would adopt the theory of second collision liability. Further, there is the issue of whether this Court should defer to the *Wilson* court's prediction of North Carolina law under the holding of the Second Circuit in *Factors, supra*. It is respectfully submitted that these are important and critical issues which should be addressed by this Court. This is particularly so when this Court itself recognized the difficult task of

prognositicating the law of North Carolina in this matter. The defendants herein should, therefore, be granted a further stay of the mandate so that this Court may consider granting leave to defendants to file a second petition for rehearing in this matter. Only by way of a second petition for rehearing can the significant issues raised by *Wilson, supra,* and *Factors, supra,* be fully briefed and presented for appropriate review.

10. The within Affidavit is therefore respectfully submitted in support of the motions filed by the defendants herein for (1) the extension of the stay of the mandate and (2) leave to file a second petition for rehearing, or in the alternative, for a rehearing en banc.

JOHN T. DOLAN

Sworn and subscribed to
before me this 18th day
of August, 1981.

ELEANOR M. DOGANIER
A Notary Public of New Jersey
My Commission Expires Jan. 14, 1985

Appendix

81-339
NO.

FILED
AUG 21 1981
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VOLKSWAGENWERK, A.G. a West German Corporation and VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation,

Petitioners,

vs.

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

No. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator for the Estate of Jose Torres, deceased,

Appellees

v.

VOLKSWAGENWERK A.G., a West German corporation and VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 77-1413)

Argued December 1, 1980

Before: ADAMS, GARTH and SLOVITER, *Circuit Judges*

(Opinion Filed April 27, 1981)

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Appendix A

OPINION OF THE COURT

GARTH, *Circuit Judge.*

This products liability action stems from a single car "roll-over" accident of a Volkswagen van. The plaintiffs sought to recover on causes of action sounding in strict liability, breach of warranty and failure to design a crashworthy vehicle. The case went forward on strict liability and "crashworthiness" theories. The jury awarded damages to the plaintiffs after finding that the vehicle's "ball cage" was defectively, although not negligently, manufactured and that the van's glass retention system was negligently designed, causing the plaintiffs' injuries to be significantly enhanced. Thus, in the district court the plaintiffs succeeded both on their strict liability and crashworthiness theories. The vehicle's driver was found to be free of negligence.

Although we affirm the jury's verdict, we do so only on the basis of plaintiffs' crashworthiness theory, as we do not read North Carolina law to provide a cause of action grounded on strict liability.[1]

I.

On July 18, 1975, on a North Carolina highway, a single vehicle accident occurred involving a 1974 Volkswagen Van (Microbus Type II). Passenger Torres was killed. Ramos, who was driving the van, and passengers Seese and Irizarry were severely injured. Passenger Maldonado, the only occupant of the vehicle who was not ejected from the van, was only slightly injured. In the suit that was filed by Seese, Irizarry, Ramos and the representative of Torres, it was alleged that one Thomas J. Weir had forced Ramos off the road onto the shoulder of the highway. When Ramos attempted to steer the van

---

1. The parties agreed at the outset that this case was governed by the law of North Carolina.

back on to the road, the van overturned. All but one of the occupants of the Volkswagen were ejected from the van through the windows which "popped out." The plaintiffs' diversity action named Volkswagen of America and Volkswagen, A.G. ("VW") in addition to Weir as defendants.[2]

On appeal, VW argues that the district court erred in allowing the case to proceed on strict liability and crashworthiness theories and that significant trial errors require the granting of a new trial. Of the alleged errors asserted, VW stresses the exclusion of certain evidence by the district court concerning the non-use of seat belts by the plaintiffs and the district court's rulings that the requirements for proof of damages set out in *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976) were met by the plaintiffs. Additional errors claimed by VW include the admissibility of evidence introduced from the Fatal Accident Reporting System (FARS) and the relevance of a Federal Motor Vehicle Safety Standard. Finally, VW argues that the use of alternate jurors after deliberations had begun, gave the defendants a right to a new trial because of the technical violation of Federal Rule of Civil Procedure 47(b), which provides that alternate jurors shall be discharged after the jury retires to consider its verdict.

II.

Section 402A of the *Restatement of Torts, Second* makes the seller or manufacturer of any product that is in a defective condition which is unreasonably dangerous[3] to the user or consumer or to his property, subject

---

2. Weir is not a party to this appeal. An order of the district court on August 27, 1979 approved a settlement between the plaintiffs and Weir.

3. Some states, in adopting the Restatement rule, have dropped the "unreasonably dangerous" requirement. *See e.g.*, Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 391 A.2d 1020 (1978) and Suter v. San Angelo Foundry and Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

to liability for physical harm caused thereby, if the seller is engaged in the business of selling the product and the product reaches the user without substantial change. The rule applies even when the seller has used all possible care in preparing and selling the product and although there is no privity of contract between consumer and seller.

In 1965, the *Restatement of Torts, Second* was promulgated and from that time until the district court's decision in this case, forty-five states adopted the principle of strict liability in substantially the form described in §402A of the Restatement. Moreover, during that period, no state Supreme Court ever rejected the strict liability theory.

With that circumstance as a backdrop, the district court ruled that the plaintiffs could assert the doctrine of strict liability in tort because it predicted that the North Carolina Supreme Court would adopt that doctrine when it was presented with that issue. Although North Carolina intermediate courts[4] had refused to accept the theory of strict liability in tort, the district court observed that in recent years the North Carolina Supreme Court had not precluded the use of that doctrine.

At the time of the district court's ruling, which predicted the adoption of strict liability by North Carolina, more than fifteen years had elapsed since the North Carolina Supreme Court decided *Wilson v. Lowe's Asheboro Hardware, Inc.*, 259 N.C. 660, 131 S.E. 2d 501 (1963). *Wilson* held that in North Carolina the obligation of a manufacturer to the consumer was governed by the law of negligence, not by any concept of strict liabil-

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4. We are aware that as recently as 1979 a North Carolina Court of Appeals had noted in Fowler v. General Electric Co., 252 S.E. 862, 864 (1979) that the North Carolina courts had "not embraced the doctrine of strict liability in tort." Later, the Court of Appeals of North Carolina in Cockerham v. Ward, N.C. App., 262 S.E. 2d 651 (1980) again implicitly rejected the theory of strict liability.

ity. Against this background, the district court predicted that if the North Carolina Supreme Court were faced with the questions of whether it should apply a strict liability theory, it would reject its prior *Wilson* decision, and would follow the lead of the vast majority of states and would adopt §402A as North Carolina law.

The district court, in reaching its conclusion, relied on *National Surety Corp. v. Midland Bank*, 551 F.2d 21 (3d Cir. 1977) which held that a federal district court, while it may not ignore the decision of an intermediate [state] appellate court, is free to reach a contrary result if by analyzing "other persuasive data; [it] predict[s] that the [North Carolina Supreme Court] would hold otherwise." *Id.* at 30. It did so without recognizing that here, the Supreme Court of North Carolina had already spoken to this issue (in *Wilson*), whereas in *National Surety Corp.* there had been no New Jersey Supreme Court decision which had dealt with the question that was in controversy there.

It was only after the district court's decision in this case, but during the pendency of this appeal, that the North Carolina Supreme Court in *Smith v. Fiber Control Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980), refused to adopt the principle of strict liability in tort. In *Smith*, a personal injury action had been brought against the manufacturer of a machine which was responsible for injuring an employee who was working in a textile mill. The issue deemed dispositive by the Supreme Court of North Carolina was "whether there was sufficient evidence to carry the case to the jury on the question of contributory negligence." *Id.* at 507. In concluding that contributory negligence was properly submitted to the jury, the Court specifically addressed the issue of strict liability in product liability actions. Because the North Carolina Supreme Court's statement in this respect answers the arguments urged upon us by Seese, we quote this portion of *Smith* in full:

> Finally, plaintiff and amicus curiae urge this Court to adopt the doctrine of strict liability in product liability actions. In response to this request, we note that recent comprehensive legislation in this area by the General Assembly does not adopt strict liability in product liability cases. See G.S. 99B-1, *et seq.* (the 1979 Products Liability Act). Significantly, the Products Liability Act specifically reaffirms the applicability of contributory negligence as a defense in product liability actions. G.S. 99B-4(3). Suffice it to say, that given the recent legislative activity in this area, we are not presently inclined to consider adoption of the rule of strict liability in product liability cases.

268 S.E. 2d at 509-10.

Seese, on appeal, attempts to distinguish the clear impact of *Smith*. He argues that in *Smith* the Court was only asked to consider the preclusion of a defense of contributory negligence and was not asked to consider whether a rule of strict liability should be established. He also argues that the *Smith* court eschewed adoption of strict liability because the North Carolina legislation which was enacted, and to which the Court referred, utilized an implied warranty theory which can be equated with strict liability in some respects.[5]

However, as the opinion of the North Carolina Supreme Court which we quote above clearly indicates, that court *did* consider whether or not to adopt the rule of strict liability, and it refused to do so. Significantly, the Court also refused to preclude a contributory negligence

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5. The relevant section of the North Carolina statute implicated in this argument reads:

> A claimant . . . may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity of contract shall not be grounds for the dismissal of such action.

N.C.Gen.Stat. §99B-2(b).

defense, a defense which is normally unavailable to a defendant in a strict liability action.[6]

We also conclude that Seese's second argument, which seeks to equate strict liability with implied warranty in interpreting North Carolina's Products Liability Act, is without merit. Under *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 236-37 (1940), a federal court must bow to the interpretation of the highest court of a state as "the final arbitor of what is state law." Here, the North Carolina Supreme Court has interpreted its own state statute in rejecting the theory of strict liability.

Moreover, even if the statute could be construed as adopting, rather than rejecting, the doctrine of strict liability, it would not have affected this case, because the statute explicitly provides: "This Act shall not affect pending litigation." N. C. Gen. Stat. §99 B-7. In *Wilson v. Ford Motor Co.*, Docket No. ST-C-80-2 (W.D.N.C. July 7, 1980), the court faced with this question held that ". . . Section 99-B has no application to a claim for breach of implied warranties where the death of plaintiff's intestate occurred prior to October 1, 1979, the date Chapter 99-B became effective." Here, Seese's complaint was filed some 27 months before the Products Liability Act became effective. Because Seese's action was "pending litigation" which the Act could not affect, we need not reach the question of whether the implied warranty, as used in the Act, and strict liability of §402A are but different names for the same theory under North Carolina law. We observe, however, that most jurisdictions do not treat these doctrines as identical concepts. *Dawson v. Chrysler Corp.*, 630 F.2d 950 at 955, n. 5 (3d Cir. 1980).

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6. The jury in *Smith* had found the plaintiff guilty of contributory negligence and thus the Supreme Court of North Carolina, by ruling as it did, affirmed the jury's verdict which barred Smith's claim.

Thus, even though the decision in *Smith* had not been announced when the district court in this case ruled that Seese could pursue a strict liability claim under North Carolina law, we are obliged to ". . . apply state law . . . in accordance with the . . . controlling decision of the state's highest court," at the time of our decision. *Baker v. Outboard Marine Corp.*, 595 F.2d 176, 182 (3d Cir. 1979) quoting *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543 (1941).

Adhering to that instruction and applying *Smith*, it is evident that the district court erred in permitting the jury to consider this case on a strict liability theory.

III.

Our conclusion that the district court erred in permitting the jury to consider the plaintiffs' strict liability claims is, however, not dispositive of this litigation. As we have noted previously, the plaintiffs' pleaded a "crashworthiness" theory as well as a strict liability theory.[7] A recovery under the theory of crashworthiness would not be precluded by the district court's erroneous strict liability ruling. Under a crashworthiness theory, a manufacturer is liable for the *additional* injuries resulting from a product's negligent design, even if the defect which caused the injuries to be enhanced is not the same defect that caused the accident. Relating that concept to this case, damages for injuries which flowed solely from the overturn of the van (caused by the defective

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7. The parties throughout this litigation have referred to this theory as the theory of "crashworthiness" that is, that there is a legal obligation imposed upon a manufacturer to design and produce a reasonably crashworthy vehicle. Huddell v. Levin, 537 F.2d 726, 735 (3d Cir. 1976). The district court judge characterized this theory as one of "injury enhancement." Because the two terms are interchangeable, in the course of this opinion we will refer to this theory as the crashworthiness theory, a theory describing liability for negligence that has caused injuries, but not the initial accident.

ball cage design) would be barred because Seese proved no negligence in the design of the unit and strict liability is not available in North Carolina, as we have discussed. However, damages resulting from the ejection of Seese and the other plaintiffs from the van, (which were the result of a negligently designed window retention system), could be recovered even though this latter defect was not the initial cause of the accident.[8]

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8. The district court in explaining the crashworthiness doctrine to the jury charged in part:

> When you have completed your deliberations on plaintiffs' first theory of liability and have answered the interrogatories that pertain to that theory, you will then proceed to deliberate on plaintiffs' second theory of liability. Recall that the two theories are separate and independent. Thus, you must consider plaintiffs' second theory of liability regardless of your action on the first theory.
>
> Now, plaintiffs' second theory of liability is that the design of the windshield and windshield retention mechanism in the 1974 Volkswagen were unreasonably dangerous in that it permitted the plaintiffs to be ejected, thereby causing greater injury to them than they would have received had they remained inside the microbus when it rolled over on July 18, 1975.
>
> Another name for this theory of liability is crashworthiness. Crashworthiness involves the relative ability of a vehicle to protect its occupants during the second collision, which refers to the second collision of the occupant after the accident sequence has begun.
>
> At this stage you are deliberating on the question of whether the defendants breached a duty to the plaintiff, as I will outline in a moment, to prevent or diminish the enhancement of injuries plaintiffs would have sustained as a result of the initial accident no matter who was at fault in the initial accident or no matter who was responsible for the initial accident.
>
> In plain English, what that means, the doctrine of crashworthiness does not depend on who was responsible for the initial accident; rather, it pertains to whether or not the vehicle was properly designed to minimize, rather than enhance, injuries to occupants in an accident no matter what the cause of the accident.
>
> * * *

Here, unlike the issue of strict liability which had been the subject of a North Carolina Supreme Court decision, albeit some 15 years prior to the instant action *(Wilson v. Lowe's Asheboro Hardware, Inc.)*, the Supreme Court of North Carolina had at no time addressed or decided the issue of crashworthiness which confronted the district court in this case. We therefore approach this analysis as the district court did, by examining the decisions rendered by the only courts in North Carolina which have considered this issue and those cases upon which they relied.

For a short period, the Seventh Circuit case of *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966) generated a line of authority which held that a manufacturer is not liable for injuries that are merely enhanced but not caused by a defect in an automobile. Three federal district court cases in North Carolina, *Simpson v. Hurst Performance, Inc.*, 437 F. Supp. 445 (M.D.N.C. 1977), *Alexander v. Seaboard Air Line Railroad Co.*, 346 F. Supp. 320 (W.D.N.C. 1971), and *Bulliner v. General Motors Corp.*, 54 F.R.D 479 (E.D.N.C. 1971) followed the *Evans* holding. But as the district court noted, *Evans* itself was overruled in 1977 by *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977). Another district court in North Carolina in *Isaacson v. Toyota Motor Sales*, 438 F. Supp. 1 (E.D.N.C. 1976), however, did not follow the *Evans* case, but rather had been persuaded by the rationale of an Eighth Circuit case, *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). *Larsen* held that an auto-

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NOTE 8 — *(Continued)*

> In order to find the defendant liable under a crashworthy or second collision theory based on the design used in the windows and windshield retention systems of the 1974 Type 2 vehicle, you must find that the plaintiffs have proved by the greater weight of the evidence that the defendant was negligent in the design in question.

(Trial Transcript p. 7747-48).

mobile manufacturer is responsible for damages resulting from a negligent design defect, even if the defect did not cause the accident.

The *Isaacson* decision was filed in *June, 1976* more than a year earlier than *Simpson*. *Simpson*, however, made no mention of *Isaacson*.[9] Thus, neither of the leading district court cases in North Carolina which confronted the crashworthiness doctrine issue ever analyzed the reasoning or logic of the other. Faced with the circumstance that North Carolina had no governing decision in this field, and had only conflicting district court decisions, the district court here found the reasoning of *Isaacson* to be the more persuasive. In *Isaacson*, Chief Judge Larkins of the Eastern District of North Carolina predicted that the North Carolina Supreme Court would find the arguments made in *Larsen* compelling, if it were to consider them. Thus, the plaintiff there was permitted to plead a crashworthiness theory and the defendant's motion to thus limit the scope of the plaintiffs' action, was denied.

The *Larsen* rule, which *Isaacson* predicted would become the law of North Carolina, and the cases which have followed *Larsen*, find no rational basis for distinguishing between injuries caused by automobile accidents wherein the defect caused the accident, as contrasted with injuries resulting from an accident where the defect enhanced the damages but did not cause the accident. *Isaacson* stated:

> It is clear that a manufacturer owes a duty to the purchasers of its automobiles to design and construct an automobile that is reasonably safe to be

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9. We can only surmise that the reason *Simpson* failed to cite *Isaacson* was because *Isaacson*, although filed earlier was not officially reported until it appeared in 438 F.Supp. This was subsequent to the date that *Simpson*, which was filed later than *Isaacson*, was reported in an earlier volume, 437 F.Supp.

> driven on the highways and is devoid of defects which would cause accidents and subsequent injuries. The duty should also extend to designing and constructing an automobile which does not expose the occupants to an unreasonable risk of harm in the event that the automobile is involved in a collision.

438 F. Supp. at 7-8.

The history of automobile products liability law has been one which has taken into account the urgent need to provide incentives to manufacturers to take those steps necessary to minimize potential harm-causing defects. As the Seventh Circuit noted in overruling *Evans*, "The discernible trend in products liability law has been to increase the duty owed by manufacturers for injuries caused by their products." *Huff v. White Motor Corp., supra* at 109.

While it is hazardous, as we saw with respect to strict liability, to predict what the North Carolina Supreme Court might hold by simply totalling the number of states that have adopted a particular rule of law, we observe that in *Huff v. White Motor Corp., supra* at 110-111, the Seventh Circuit did compile a list of those cases following *Larsen* and those which followed *Evans*. Thirty jurisdictions were shown favoring the former, while only three followed the latter. The court in *Van Tine v. Nissan Motor Co., Ltd.*, 463 F. Supp. 1274 (W.D. Pa. 1979) at 1277 n.3 also took note of this tally. That court also questioned whether the *Evans* rule was still the law in West Virginia, one of the two states which still followed *Evans* despite its rejection by *Huff*. If West Virginia were to follow *Huff*, Mississippi would then be the sole remaining state clinging to the rule announced in *Evans*.[10] As the court noted in *Bowman v. General Mo-*

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10. Recently two more federal district courts in North Carolina dealt with this issue and reached opposite results.

In Sealey v. Ford Motor Co., 499 F. Supp. 475 (E.D.N.C. 1980),

tors Corp., 427 F. Supp. 234 (E.D. Pa. 1977) at 243 n. 16, ". . . the rejection of the principles of *Evans v. General Motors* [citation omitted] now seems well established." *See also* Comment, *Automobile Crashworthiness: Evans Takes a Backseat*, 21 Vill. L. Rev. 73 (1975-76). Most recently, in *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir., 1978) the Tenth Circuit said that it seems likely that yet another state, Wyoming, would adopt *Larsen*, adding, at page 781, "[T]o follow the repudiated rule of *Evans* . . . merely because it involves a second impact brought about by an original collision should not free the manufacturer. The effect of this would be to exempt the manufacturer from liability even if he were negligent."

In the absence of any expression by North Carolina and a split of authority by federal courts in that state, a prediction as to the law North Carolina would adopt can only be based on the greater persuasiveness of one of the conflicting theories, with an eye to the nationwide trend in judicial and legislative law-making. Having had the benefit of what we regard as unimpeachable logic in our own circuit's recent case of *Huddell v. Levin, supra*, which stated: "We take it as beyond peradventure that

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the court said, " . . . this Court does not feel that the cited cases give any guidance as to what the Supreme Court of North Carolina would do with the issue here presented." *Id.* at 478. The *Sealey* court went on to say, "[f]aced with the obvious split of authority in the Federal Courts sitting in North Carolina and the near unanimity of opinion elsewhere, I cast my vote — make my prediction of what the Courts of North Carolina would do if faced with this issue — in favor of the plaintiffs and adopt the *Larsen* doctrine. This Court is of the opinion that the reasoning behind the rule set out in *Evans* is unrealistic and would not be followed by the North Carolina Courts." *Id.* at 479.

In Wilson v. Ford Motor Co., Docket No. ST-C-80-2 (W.D.N.C. April 9, 1980), the court followed Alexander v. Seaboard Airline Railroad Co., 346 F. Supp. 320 (W.D.N.C. 1971) and rejected the *Larsen* rule. *Id.* at 6.

an automobile manufacturer today has some legal obligation to design and produce a reasonably crashworthy vehicle." 537 F.2d at 735, we are not disposed to base our prediction of North Carolina law on an outdated and repudiated doctrine. Like the district court here, we too are convinced that North Carolina is more likely to follow the enlightened rule of *Larsen* rather than the rule of *Evans*. Thus, we find no error in the district court's ruling that the plaintiffs could proceed on a crashworthiness theory.

IV.

A.

VW argues that the district court erred in not permitting VW to introduce evidence that the plaintiffs were not wearing seat belts at the time of the accident. VW contends that this evidence would show (1) that the non-use of seat belts meant that the plaintiffs were contributorily negligent; and (2) that the design of the vehicle with respect to "crashworthiness" was predicated on the availability and use of seat belts by the passengers.

Under North Carolina law, a failure of a plaintiff in an automobile torts action to wear seat belts may not be used as evidence to show contributory negligence. *Miller v. Miller*, 273 N.C. 268, 160 S.E. 2d 65 (1968). *Miller*, recognizing that there is no common law duty for a motorist to routinely use seat belts, held that since failure to use a belt is not negligence *per se*, "it could be contributory negligence only when a plaintiff's omission to use the belt amounted to a failure to exercise the ordinary care which a reasonably prudent person would have used under the circumstances preceding that particular accident." *Id.* at 70.

The *Miller* court suggested that contributory negligence could only arise when a "plaintiff, with prior knowledge of a specific hazard — one not generally asso-

ciated with highway travel and one from which a seat belt would have protected him — had failed or refused to fasten his seat belt."[11] *Id.* Thus, *Miller*, as it pertains to this case, leaves no room for a contributory negligence defense based on the plaintiffs' failure to wear seat belts.

However, VW seeks to distinguish the present case from a *Miller* situation because it claims that here it is the crashworthiness of the vehicle in a "second-collision" which is at issue. VW argues that, in such a case, seat belt evidence may be introduced, not to show that the plaintiffs were contributorily negligent with respect to the initial accident, but rather to show that seat belts were provided in the vehicle as a part of the vehicle's total retention system and, if used, would have prevented the "second collision" passenger ejectment and the damages that resulted therefrom. VW therefore contends that its seat belt evidence is not inconsistent with *Miller* and charges that the district court erred in failing to instruct the jury to consider whether or not plaintiffs' failure to wear seat belts was the proximate cause of the injuries, as was the case in *Dawson v. Chrysler Corp.*, *supra* at 960.

There are two reasons why VW's argument must be rejected. First, *Miller* effectively precludes the raising of *any* seat belt contributory negligence defense in this type of case because there is no duty under North Carolina law to wear seat belts. The only exception to this rule is the specific hazard concept, an example of which we have noted in note 9, *supra*, but that exception is not presented here. Thus, starting from the premise that the

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11. The example given by the *Miller* court involved " . . . a case in which the defendant driver tells the plaintiff passenger to buckle his seat belt because the door on his side has a defective lock and might come open at any time. The passenger fails to buckle the belt and, in consequence, falls out of the automobile when the door comes open on a curve." Miller v. Miller, 273 N.C. 268, 160 S.E. 2d 65, 70 (1968).

failure to wear a seat belt cannot constitute negligence in North Carolina, it follows that no such failure may reduce a plaintiff's damages. *Miller* holds as much stating: "The same considerations. . . which reject the proposition that a motorist's failure to fasten a seat belt whenever he travels is negligence, impel the rejection of the theories that such a failure should reduce his damages." *Miller, supra,* at 74.

Nor can it be argued, as VW does, that the plaintiffs, by failing to wear seat belts, have been deficient in proving proximate cause — an element of their *prima facie* case. The jury here, as in *Dawson,* was instructed on proximate cause, and in this case found it in VW's design of the window retention system.[12] Indeed, the district court had removed from the jury's consideration any aspect of the case concerning seat belts, a matter that will be discussed below. Thus, on the basis of the evidence, the jury here was satisfied that all elements that the plaintiffs were required to prove to obtain a verdict predicated on negligence and proximate cause, had been satisfied. We cannot say that on the record as a whole, the jury's verdict which found that the glass retention system had been negligently designed, proximately causing the plaintiffs' injuries is unsupported. VW's argument that proximate cause was not proved in

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12. The jury, here, was required to answer the following special interrogatories which relate to proximate cause in the crashworthiness context. Each interrogatory was answered "yes."

> Was Volkswagen negligent in the design of the windshield retention system in question?
>
> * * *
>
> Was Volkswagen negligent in the design of the side window retention system in question?
>
> * * *
>
> If negligent, was that negligent design for windshield and/or window retention *the proximate cause of the injuries which were sustained by [each plaintiff]*? (emphasis added)

Trial Transcript p. 7853-54.

this case would lead to the illogical conclusion that had seat belts *never* been provided in the van, an identical accident giving rise to identical injuries would result in no damages recoverable by the plaintiffs because the element of proximate cause could not have been proved. We cannot accept this hypothesis any more than we can accept the argument advanced by VW here. In our view, the two circumstances are identical: the hypothetical absence of seat belts on the one hand and their non-use as permitted under North Carolina law on the other must necessarily lead to the same result.

Second, the district court not only permitted VW to question the plaintiffs about their use of seat belts, but the district court itself interrogated VW's principal expert witness, Mr. Pohl, on whether the van's window retention system was designed with seat belts as an integral component of the system. Mr. Pohl replied that the retention system was *not designed* with the assumption that seat belts would be used by the van occupants. The court's colloquy with Mr. Pohl is significantly revealing:

> THE COURT: . . . [I]s it [the van's window retention system] designed without regard for whether they will be wearing seatbelts or not wearing seatbelts?
>
> THE WITNESS: That's correct, yes.
>
> THE COURT: In other words, that is not within the contemplation of the designer or of the company, is that correct?
>
> THE WITNESS: Yes, your Honor. (Supp. A. p. 66.)

The plain import of Pohl's testimony is that VW did *not* consider seat belts as an element of its window retention design that would tend to protect the occupants of a Type II van from ejection in a roll-over accident. Thus, we agree with the district court that it would have been irrelevant for the jury to consider the use of seat belts in deciding whether the window retention system

was negligently designed. The district court recognized the significance of this testimony when it instructed the jury.

> You will recall, ladies and gentlemen, that I permitted the issue of seat belts for a very limited purpose only. You will remember that I told you I would permit the question of seat belts only as it pertained to the reasonableness of the design. That is to say, was it reasonable for Volkswagen to design a windshield or side window retention system on the assumption that the occupants would be wearing seat belts? However, even that is no longer in the case, because you will remember the testimony of Mr. Pohl, who testified that Volkswagen in designing its windshield and its side window retention system did not assume that the occupants would be wearing seat belts. Therefore, there are no seat belt considerations in this case.

(Trial Transcript p. 7759).

In light of Mr. Pohl's testimony, VW has been remitted to arguing that the "trial court completely misconceived the testimony of Mr. Pohl." (Reply Br. p. 11, n. 2) The record, however, does not support VW's characterization. We have independently reviewed the record and we are satisfied that it reveals without contradiction that VW did not design its window retention system with any thought of seat belts in mind. Thus, the district court did not err in its instruction given to the jury which reflects the record in this respect and the North Carolina law as we have discussed it.[12a]

12a. The dissent argues that the district court erred in not permitting consideration of seat belts as one of several factors to be considered by the jury in determining whether the design of the Volkswagen was defective. In support of this thesis the dissent cites *Wilson v. Volkswagen of America*, 445 F. Supp. 1368 (E.D.Va. 1978). However, this case is distinguishable from *Wilson*.

B.

A related question is whether the trial court properly applied the standards prescribed by this court in *Huddell v. Levin*, 537 F.2d 726, 737-38 (3d Cir., 1976). There, we held that in a crashworthiness or enhanced injury case, there must be proof of (a) an alternative, safer design, practicable under the circumstances; (b) the injuries, if any, that would have resulted had the alternative, safer design been used; and (c) the extent of enhanced injuries attributable to the defective design.

VW attacks the judgment of the district court because it views the testimony of plaintiffs' expert witness Dr. Brenner, who was produced by plaintiffs to satisfy the requirements of *Huddell*, as inadmissible and prejudicial. VW questions his expertise and Dr. Brenner's reliance on the depositions of two physicians in preparing his testimony. VW classifies Dr. Brenner as an "accident reconstructionist," qualified to describe the sequence of events surrounding an accident based on the laws of physics,[13] but not qualified to express an opinion on the cause of the plaintiffs' injuries.

First and foremost, in this case VW's own expert testified that seat belts were not considered in the design of the window retention system. No such evidence is revealed in *Wilson*. Second, the court in *Wilson* acknowledged that had Virginia law proscribed seat belt testimony in mitigation of damages as Minnesota's and Tennessee's statutes provide, *Wilson* would have reached a different result. 445 F. Supp. at 1374. Here, North Carolina law as set forth in *Miller v. Miller*, 273 N.C. 268, 160 S.E. 2d 65, (1968), not only rejects contributory negligence based on a motorist's failure to wear a seat belt, but also explicitly rejects, just as do the statutes cited in *Wilson*, any theory that such a failure may be used to reduce the injured plaintiff's damages. *Miller* at 74.

13. VW describes this role in its Reply Brief at 20:

> An accident reconstruction expert's expertise allows him to determine "the sequence of events by application of the laws of physics and known behavioral characteristics of the vehicle . . . in conjunction with the circumstances of the accident. The pertinent data may include . . . impact damage, the length and

Appendix A

As an auto safety engineer, with substantial credentials, Brenner was clearly qualified to testify as an expert on alternative, practical, safer designs for the van's window retention system, particularly since he had an extensive background in the development of safety performance standards for automobiles. Thus, Dr. Brenner's testimony during which he discussed alternative and safer designs for retaining windows in vans satisfied the first of the *Huddell* requirements.[14]

We are also satisfied that VW's objections to the plaintiffs' proof of the second and third *Huddell* requirements are not well taken. These *Huddell* factors both address the extent of a plaintiff's injuries. Under the second *Huddell* factor, proof is required of the injuries that would have been incurred had an alternative safer design been utilized. The third *Huddell* factor addresses the enhanced injuries incurred due to a defective design.

At the outset we recognize that the admission of expert testimony rests within the sound discretion of the district court and that the district court will be reversed only for an abuse of that discretion. We also recognize

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NOTE 13 — *(Continued)*

nature of tire marks, the location of the point of collision and of positions of rest of the vehicles, the speed of the vehicles, and the maneuvers, if any, which had been performed." 1 *Frumer and Friedman, Products Liability*, §6.05[4] at 104.5 (1975)

14. For example, the windows in the overturned van were not retained with adhesive. Dr. Brenner advocated retaining windows by use of glue or metal clips (Trial Transcript p. 1672). Indeed, as we discuss in part IV.C *infra*, VW successfully tested vans with glued-in windows.

that Fed.R.Evid. 703[15] broadens and liberalizes the basis for expert opinions.[16]

VW argues that the district court erred not only in permitting Dr. Brenner to testify with respect to window retention design (the first *Huddell* requirement) but also that the district court erred in permitting him to testify with respect to the second and third *Huddell* considerations, i.e., the injuries that would have been suffered by

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15. As Judge Godbold, writing for the Fifth Circuit in *Bauman v. Centex Corp.* 611, F.2d 1115 (5th Cir. 1980) stated "In general, whether facts relied on by an expert are in evidence, or ever could be in evidence, is not relevant. The pertinent inquiry under Rule 703 is whether the facts are of a type reasonably relied on by experts in the particular field. The object of this inquiry is of course to determine the reliability of the expert's testimony." *Id.* at 1120. This concept is explained in the Note of the Advisory Committee on Proposed Rules, 56 F.R.D. 183 (1972):

> The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other factors, hospital records and xrays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

Id. at 283.

16. Rule 703 provides:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or interences upon the subject, the facts or data need not be admissible in evidence.

the plaintiffs had a safer design been utilized and those that were suffered by the plaintiffs because of their ejection from the van. VW argues that the medical evidence required to satisfy the second and third *Huddell* factors must be provided by medical experts and charges that Dr. Brenner, in formulating his opinion relied not only on facts which he acquired from two physicians but that he also relied on the physicians' opinions.

We are not persuaded by VW's arguments in light of the standard provided by Rule 703 and the standard by which we test the district court's discretion. As an accident reconstruction expert, Brenner was competent to testify about the manner and circumstances surrounding the ejection of the plaintiffs from the van. Thus, his testimony about where the bodies landed and how the plaintiffs incurred their injuries is clearly within the scope of his expertise. Accordingly, the district court properly exercised its discretion in admitting Dr. Brenner's testimony that, had the integrity of the window retaining system been maintained and had the windows therefore remained in the vehicle, the plaintiffs would not have been injured. Buttressing this testimony is the fact that the one occupant of the vehicle who sustained no injuries was Maldonado, who was the only occupant not ejected from the van. All the other occupants, who were ejected, suffered grave injuries or death.[17] Moreover, Dr. Brenner could, pursuant to Rule 703, base his opinion as to the cause of plaintiffs' injuries on the physicians' testimony which appears in their independently admissible depositions. Rule 703 permits his opinion to be formulated by use of the facts, data and conclusions expressed by the physicians.

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17. Government statistics were introduced in evidence which demonstrated that the likelihood of fatal injury is substantially enhanced if the occupants of a vehicle are ejected.

Based on our review of the record, and in particular Dr. Brenner's testimony, we are satisfied that appropriate relevant evidence was produced by the plaintiffs with respect to each of the standards set forth in *Huddell* concerning alternative safer design, injury causation, and injury enhancement. Thus, the district court acted within its discretion in properly admitting this evidence and in ruling that the *Huddell* standards had been met.

C.

We turn next to two contentions made by VW in which VW complains that the district court improperly admitted at trial evidence of the FARS report and evidence of Safety Standard 212. VW's brief characterizes the FARS information and its use as follows:

> The Fatal Accident Reporting system (FARS) is statistical information pertaining to fatal accidents operated under the auspices of the National Highway Traffic and Safety Administration ("NHTSA"). Dr. Robert Brenner requested such information pertaining to Volkswagen, Ford, Chevrolet and Dodge vans. The raw data received, in the form of computer printouts, were received in evidence as exhibits P-159 and P-160.
>
> The raw data purportedly show the greater likelihood of ejection from a Volkswagen van compared to competitive vehicles, thereby corroborating the erroneously allowed evidence of Brenner based on Camps' drawings.

VW brief at 42.[18]

VW objects to the admission of the FARS data on three grounds: (1) surprise; (2) non-comparability of the

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18. In "D" *infra*, we hold that the district court did not abuse its discretion in permitting Dr. Brenner to testify with respect to the Camps drawings.

vans and the accidents; and (3) lack of original records, as required by Fed.R.Evid. 1006. The district court found that VW was not surprised by the introduction of the FARS data and our review of the record and that ruling reveals that the district court did not abuse its discretion in this respect.

Addressing VW's third ground of objection pertaining to the lack of original records, it appears that the FARS data were produced as certified copies of official records and were therefore admissible as public records under Fed.R.Evid. 1005[19], as well as being admissible under the Business Records Act (28 U.S.C. §1732) and under Fed.R.Evid. 703. *See* note 16, *supra*. The district court so held, and we agree. This leaves for our consideration VW's challenge to the FARS data based on non-comparability of the accidents and vehicles reflected in that data base.

VW complains that the FARS report did not reveal the speed at which the accidents occurred; whether the accidents were single vehicle accidents or accidents involving impacts with another vehicle; the "how" and in what manner the ejections occurred, as well as a number of other variables. The district court, apparently agreeing that variables did exist nevertheless admitted the FARS data in evidence, ruling that VW's objections went to the *weight* of the evidence and not to its admissibility. In so ruling, the district court stated:

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19. F.R. Evid. 1005 reads:

PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

> Of course, these accidents will have happened in different ways and under different circumstances. And, of course, that has to be taken into account when you deal with weight. But when you have such a significant difference between ejections of Volkswagens versus the others, coupled with the fact — at least according to his testimony — that the others are abiding by 212 standards, while Volkswagen is not, this is something, then, for the jury to evaluate in judging whether or not a reasonably prudent manufacturer would have abided by 212 standards whether applicable to them or not.

(Trial Transcript p. 1603).

We have reviewed the exhibits and testimony and it is clear that the VW van in issue here was similar to the other Type II vans which are the subject of the FARS reports. Indeed VW makes no affirmative assertion and points to no proof that the window placement of the van in this case differed significantly from the vans reported in FARS. We conclude that the district court's evidentiary rulings with respect to the FARS report were proper.

VW's second claim with respect to documentary evidence involves the admission into evidence of Federal Motor Vehicle Safety Standard 212, 49 C.F.R. §571.212 which establishes retention requirements for windshield mountings, but not for "multi-purpose passenger vehicles" like the VW Type II. The court and both parties were aware that the VW Type II van was not required to meet the Standard 212. This "exemption" was not because window retention was regarded unimportant or impossible on vehicles such as the VW van, but rather because the windshield of the van, due to its unique configuration would shatter on impact with the frontal barrier that was used in the test. VW argues that this exemption meant that the Standard was wholly irrelevant to a VW Type II van. The district court, however,

permitted the Standard to be considered by the jury in deciding whether VW had taken those measures reasonably necessary to make the van's windshield resistant to a "pop-out" during an accident. It took special care to caution the jury in this respect:

> In this regard I wish to caution you, however, that the mere failure to comply with the Standard is, itself, not evidence of any negligence on the part of the defendants herein, since that Standard did not apply to the accident vehicle at the time of manufacture. The Standard simply constitutes evidence which, together with all the other evidence before you with regard to the design of the windshield and window retention systems, can be taken into account by you in assessing whether the defendants herein have breached their duty of care owed to the plaintiff.

(Trial Transcript p. 7755).

The plaintiffs claim that even though VW could not perform the Standard 212 test because of the van's configuration, it could, nevertheless, satisfy the retention requirements of the standard. In this connection, the plaintiffs claim VW's own crash tests revealed that glued-in windows met the Standard. (Seese br. at 38.) Even without regard to the crash test claim made by the plaintiffs, we are satisfied that the district court's carefully crafted instruction was sufficient to permit the introduction of the Standard into evidence for the limited purpose explained by the district court.

D.

VW has raised on this appeal a number of additional arguments. These arguments challenge the district court's rulings on different points of evidence. VW also claims to have been prejudiced by juror exposure to a

television program.[20] We have reviewed each argument made and we are satisfied that the district court neither erred nor abused its discretion in its rulings.

E.

Finally, we must consider whether the trial was tainted by the district court's failure to dismiss alternate jurors at the commencement of the jury's deliberations and the district court's subsequent substitution of alternate jurors subsequent to the commencement of the jury's deliberation.

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20. As they appear in VW's brief on appeal, the particular points of error are listed as follows:

> The exclusion of prior inconsistent statements made by Alexander Maldonado unduly allowed the deposition testimony of Alexander Maldonado to have greater credibility than it deserved.
>
> The Court erroneously refused to allow defendants to read in the deposition of Brenton Smith.
>
> The trial court erred in that it erroneously allowed irrelevant, immaterial and prejudicial evidence to be introduced against defendants while at the same time it erroneously excluded probative, relevant evidence for defendants.
>
> The Court improperly allowed Frank Camps to testify on behalf of plaintiffs, as plaintiffs failed to identify Mr. Camps as an expert until the eve of the trial.
>
> The trial court improperly inquired of Frank Camps on the subject of cost-benefit analysis.
>
> The trial court erroneously permitted Byron Bloch to testify regarding irrelevant and inadmissible patents.
>
> The Court erred in allowing Reinaldo Irizarry's "Day in the Life Film" into evidence and raised the false issue of bifurcation.
>
> The jury during the trial was exposed to a television program, highly critical of defendants, on which plaintiffs' expert appeared all to the prejudice of defendants.
>
> The Court improperly compelled Ian Ceresney, Esq., to testify at trial.

Appendix A

Fed.R.Civ.P. 47(b) provides that "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Here, however, all parties agreed that the alternate jurors would not be discharged after the jury began its deliberations. One day after this consent was given, snow delayed the arrival of two jurors. Two alternate jurors were then substituted for the two absent jurors and all jurors were instructed to start their deliberations anew. The delayed jurors appeared three minutes after the reconstituted jury was sent to deliberate.

From our vantage point we are in no position to second guess the district court judge with respect to the time he allowed before taking action to replace the two delayed jurors. This is a matter peculiarly within the district court's discretion. While it now appears that a little more patience would have prevented VW's challenge to the trial's conduct, we cannot say that the district court judge abused his discretion. We recognize, as did he, that at the time his decision was made to substitute alternates for the two tardy jurors, he was doing so against the background of a prior agreement of the parties. Moreover, as we have noted the district court instructed the jury to begin its deliberations anew after the substitutions were made. Subsequently, VW moved for a mistrial and the district court judge replied:

> . . . when both sides say that they will be content with a certain procedure there is nothing that I know of, no reason why I know of, that the Court cannot accede to it, provided it doesn't violate some sort of public policy. This, obviously does not.
>
> . . . more than simply a contract by agreement, we have in this instance an estoppel. It was with your consent that we didn't wait for the remaining jurors but in fact substituted the alternates and let the deliberations go forward.

I don't think, in all fairness, that you can be heard now to ask for a mistrial for a procedure which you have for two days now endorsed fully and which in reliance thereon, the entire trial has gone forward on that basis.

Not only that, but with full knowledge and awareness, because I said yesterday that I could do it only by consent, because the rules didn't authorize it.

Under these circumstances, in a case such as this, where the trial has gone forward for ten and a half weeks, I guess the plaintiffs are individuals whose resources are obviously finite, they are suing one of the great corporations of the world, a mistrial in such circumstances is the equivalent of total victory, or so close thereto as to be without distinction for the corporation. Under these circumstances, where the corporation, ably represented, elects to proceed on a certain course, not only with imputed knowledge but with actual knowledge because I said so yesterday, that they didn't have to, when twice with that actual knowledge they go forward and endorse a procedure, they cannot be heard later to underdo [sic] it all to the extent that a ten and a half week trial gets washed out, 7500 pages of record get torn up, thousands of pages of exhibits are heaved aside, and the plaintiffs, who are crippled, severely injured as a result of an accident, must do it over again. That result would be unconscionable. Therefore, I have to reject your application.

(Trial Transcript p. 7837-38).

VW calls our attention to *Truscott v. Chaplin*, 403 F.2d 644 (3d Cir. 1968) where the court there recognized the mandatory nature of Rule 47(b) in stating that "[o]ur Rule 47(b) requires that the alternate jurors 'shall be discharged after the jury retires to consider its verdict.' " *Id.* at 645.

However, other courts have retained alternate jurors and allowed them to be substituted providing consent was given to this practice. The Fifth Circuit, in *La-Tex Supply Co. v. Freuhauf Trailer Civ. Freuhart Corp.*, 444 F.2d 1366 (5th Cir. 1971), cert. denied, 404 U.S. 942, (1971) allowed an alternate juror to attend the jury's deliberations so that he might be substituted as juror in the event a regular juror was excused to attend a funeral. Counsel for both parties agreed. Based on their agreement the court found no error. *See also United States v. Barone*, 83 F.R.D. 565 (1979). Moreover, it has been held that a defendant in a criminal case may waive the requirements of the analogous rule governing alternate jurors in criminal trials.[21] *United States v. Davis*, 608 F.2d 698 (6th Cir. 1979), cert. denied, 100 S. Ct. 1280 (1980).

In *Davis*, the court had not discharged an alternate juror. The jury after several hours of deliberations was excused for the night. The following morning, one of the regular jurors did not report because of a death in the family. After the several courses of possible action were outlined, the defendant asked that the alternate juror be substituted for the regular juror. The jury was reinstructed and later returned a verdict of guilty. The court held in a *per curiam* opinion that the defendant had waived any right to object to the substituted juror and that consequently no prejudice resulted. In holding that the defendant was bound by his consent, the court recognized that a waiver could operate to permit substitution of an alternate juror after deliberations had begun. *See also United States v. Baccari*, 489 F.2d 274, 275 (10th Cir. 1973), cert. denied, 417 U.S. 914 (1974);

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21. The relevant portions of Rule 47(b) of the Fed.R.Civ.P. and Fed.R.Crim.P. 24(c) are identical, and both read:

> An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Leser v. United States, 358 F.2d 313, 317 (9th Cir. 1966), cert. dismissed, 385 U.S. 802 (1966); and *see United States v. Lopez*, 581 F.2d 1338, 1342 (1978).

The district court, here, was careful to negate any adverse effect that deliberations might have had on the substituted alternate jurors. It instructed the jurors: "I want you to begin your deliberations anew. Actually, you hardly had started them yesterday. You didn't get these materials until nearly a quarter to 3:00, and you were in here twice before 5:00 o'clock. Start all over again. Take a fresh look at everything, begin discussing this thing." (Trial Transcript p. 7825).

Accordingly, we hold that under the circumstances present here, it was not error to allow the waiver of Rule 47(b) by consent of the parties.

V.

The dissent argues forcefully that because of the difference in damages that may result from a strict liability claim as opposed to an enhanced injury (crashworthiness) claim, a remand is indicated for a new trial on damages, limited to the crashworthiness claim. Were this issue properly before us, and had the evidence reflected a difference in damages, we could not disagree with that suggested course. However, VW on this appeal did not raise this issue and indeed, at trial, did not object to the form of the interrogatories submitted to the jury. *United States v. 564.54 Acres of Land*, 576 F.2d 982, (3d Cir. 1978) *rev'd on other grounds*, 441 U.S. 506 (1979).

Of greater significance, however, is the fact that the evidence in this case, contrasted with the more usual crashworthy case, does not support a distinction between strict liability damages and enhanced injury damages. In the usual case, it is customary to find that injuries were suffered on initial impact and were subsequently enhanced by the so-called "second collision." Here, however, testimony was adduced at trial to the ef-

fect that had the van windows not been negligently designed and had they thus remained in the vehicle, the plaintiffs would not have been ejected, and would not have been injured. The dissent does not challenge this testimony of Dr. Brenner which, fairly read, compels the conclusion that the damages sustained by the plaintiffs were no different under either theory. Trial Transcript at 1672. Substantiating this testimony as we note at p. 22-23, *supra*, is the fact that Maldonado, the one passenger who was not ejected from the vehicle, suffered *no* injuries. Thus, while in the usual crashworthy case a difference in damages is expected, here the jury had evidence before it that *no* injuries would have been suffered, and hence no damages would have occurred, had the plaintiffs not been ejected from the vehicle, even though the vehicle overturned.

In light of this evidence, it is not surprising that the jury found that the negligent design of the window retention system was "the proximate cause of the injuries which were sustained by [each plaintiff]." Typescript at 16, n. 12. Accordingly, on this record, we conclude that there is no need for a retrial on damages.

VI.

We conclude that the only error committed by the district court was to permit the jury to consider whether the defendants were liable under a theory of strict liability. That error, as we have pointed out, resulted from the district court's prediction of how the North Carolina Supreme Court would rule on that issue. That court, as we have discussed, rejected strict liability as the law of North Carolina, but it did so after the district court had ruled in this case. Accordingly, the plaintiffs' and the district court's reliance on the strict liability theory was misplaced.

However, the jury also returned a verdict finding that VW had negligently designed its window retention

system which had proximately caused the plaintiffs' injuries. We conclude on the basis of our analysis of the crashworthiness theory that the North Carolina Supreme Court would adopt that theory when it is presented. Thus, we hold that the district court properly submitted the crashworthiness claim of the plaintiffs to the jury and we affirm the jury's verdict on that ground.

We also hold, after consideration of the other errors asserted by VW, that the district court did not err and thus should be sustained in its rulings. Accordingly, the judgment of the district court will be affirmed.

ADAMS, *Circuit Judge*, dissenting.

Recognizing that we are dealing with issues that have come to the fore after a lengthy trial and subsequent to the painstaking efforts of the trial judge to resolve difficult questions about the development of tort law in North Carolina, it is with some hesitance that I dissent from the panel's disposition of this appeal.

I.

At a minimum, I believe that removal of the strict liability claim from the controversy necessitates a remand for a new trial on damages. As the majority correctly notes, the *Erie* principle mandating that state substantive law governs in diversity actions, requires that "until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law . . . in accordance with the *then* controlling decision of the highest state court." *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543 (1941) (emphasis added); *Baker v. Outboard Marine Corp.*, 595 F.2d 176 (3d Cir. 1979). Consequently, the recent state supreme court decision

in *Smith v. Fiber Control Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980), handed down subsequent to the trial court judgment, which refused to adopt the principle of strict liability in tort, vitiates the district court's prediction that North Carolina would embrace the strict liability theory. I therefore agree with the majority's holding that it was error for the district court to permit the jury to consider the plaintiffs' strict liability claim. But I cannot adhere to the ultimate conclusion reached by the majority that the misplaced reliance on the strict liability theory in no way affected the outcome of the litigation. For *assuming arguendo* that VW is still liable on the crashworthiness theory, it does not follow that the damages assessed against VW would remain unaltered after the strict liability claim has been eliminated.

As the trial judge explained to the jury, VW was potentially liable under two tort theories, but the damages recoverable under each claim involved different amounts. Thus, as the judge correctly instructed on the strict liability count, "if you find there was a defect in the right rear ball cage at the time of its manufacture and sale, and that this defect was the proximate cause of the accident, you are to award damages to the plaintiffs in an amount that will compensate them for *all* the injuries they sustained as a result of the entire accident." (emphasis added) In contrast to the strict liability theory, under which VW would be responsible for *all* ensuing damages, under the crashworthiness theory VW would be liable only for injuries which exceeded those that would have occurred had the manufacturer designed a reasonably safe and suitable vehicle. *See Huddell v. Levin*, 537 F.2d 726, 740 (3d Cir. 1976).[1] That is, in the words of the trial judge,

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1. The trial court and counsel for plaintiffs agreed that the burden of proof with regard to the crashworthiness claim would be guided by *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976). *See* J.A. 490.

you are to award damages under the second theory (if you only find under the second theory) *only for the enhanced injuries* which plaintiffs received as a result of any negligent design which you find.

You are not to award plaintiffs damages for the total amount of injury they sustained as a result of the entire accident if you find the defendant liable only on the second theory of liability." Trial Transcript 7764. (emphasis and parentheses added)

Having excised the strict liability claim from the case, I do not understand how the majority can now ignore both case law and the plain directive of these instructions, which make clear that VW is not liable for damages in full when crashworthiness is the only foundation for negligence.

It is suggested that defendants are foreclosed from raising this damage point because they did not object to the instructions or interrogatories. The defendants, however, cannot be faulted for failing to object to the instructions dealing with liability. Their position throughout the trial, as well as on appeal, was that North Carolina law did not embrace strict liability *or* crashworthiness doctrines, and that the trial court erred in its analysis of the probable evolution of state law. The problem we address here arose after the instructions had carefully distinguished the two causes of action; it comes about primarily as a result of the interrogatories that were posed to the jury by the trial judge. Once the jury found VW lia-

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Two alternate denominations for the crashworthiness concept — the enhancement or second collision theories — further emphasize that liability under such a doctrine does not make one responsible for all injuries occasioned by the initial accident, but only for those that could have been prevented by an alternate, safer design. *See* Huddell v. Levin, 537 F.2d 726, 740 (3d Cir. 1976); Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1069, 1076 (4th Cir. 1974).

ble under each distinct theory of liability, it was then simply asked to assess damages with respect to each individual plaintiff in a *lump* sum. Notwithstanding the jury finding of liability under both the strict liability and crashworthiness theories, on a hindsight basis it may be contended that it would have been preferable to insist on two separate damage assessments given that the instructions on liability and proximate cause had addressed each claim individually.[2] But to penalize VW for not demanding two distinct computations, and to require VW to pay for damages not authorized by North Carolina law, would place an unfair burden on defendants in the unusual situation here.

Inasmuch as the North Carolina Supreme Court had not settled at the time of trial either the availability of strict liability or of crashworthiness causes of action in North Carolina, VW had consistently attacked the district court's predictions respecting the eventual acceptance of each of these doctrines. And on appeal VW continued to argue that erroneous legal predictions and instructions with respect to either theory so infected the trial that judgment for defendants, or a new trial, was required. Conversely, plaintiffs maintained that if the verdict is sustained as to either of their theories, then the judgment *in toto* should be affirmed.[3] Neither party contemplated anything other than an all-or-nothing judgment. In holding VW liable for damages in full, then, based on its failure to demand separate computations in the form of discrete interrogatories, the majority is in effect requiring the defendants to foresee the nearly

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2. Fed. R. Civ. P. 51, which precludes a party from assigning "as error the giving or failure to give an instruction unless he objects thereto," refers to instructions but makes no mention of interrogatories.

3. Although this may represent an aggressive plaintiff strategy, it ignores significant differences in the damages recoverable under the two liability theories.

inscrutable: namely, that the appellate court would overturn the district court's legal forecasts regarding North Carolina law with respect to strict liability but not concerning crashworthiness. Any other outcome — upholding both theories, upholding the strict liability but not the crashworthiness, or invalidating both theories — would have produced the all-or-nothing results that the respective parties envisaged.

Moreover, it was the plaintiffs who proceeded under two theories of liability — a course ultimately proved by the highest court of North Carolina to be incorrect. And as prescribed by *Huddell*, under the crashworthiness theory the burden was on the plaintiffs to establish what injuries were attributable to the accident itself and what injuries were sustained solely on account of the defective window system. *See Huddell v. Levin*, 537 F.2d 726, 738 (3d Cir. 1976). Because, under *Huddell*, the applicable procedure required plaintiffs to prove enhanced injuries — that is, those that would not have occurred but for the defective design — it would appear reasonable that plaintiffs be required to carry the parallel burden of protecting their liability theory with sufficiently specific interrogatories on damages. It would seem unfair, at least to me, to permit plaintiffs' pursuit of two causes, one valid and one invalid, to convert the defendants' limited, second collision liability into plenary liability for all consequences of the accident. Yet, with the present disposition, the majority does just that.[4]

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4. As to the majority's contention that VW did not raise on appeal the point that damages under strict liability and crashworthiness theories amount to two distinctly different sums, it is suggested that VW's argument that the instructions on strict liability and crashworthiness were erroneously given and infected the entire proceedings with prejudicial error is sufficiently broad to encompass this claim. *See* Defendants-Appellants Brief at 11, 12 n.2, 14.

Appendix A

In the absence of a remand, the Court is faced with either attempting to segregate two damage figures from an indivisible lump sum, a task beyond our ability to perform, or with making the implausible assumption that *all* the damages incurred by the plaintiffs resulted from the defective window retention system. Yet this hypothesis rests on the belief that had VW designed a reasonably safe and suitable window system none of the injuries for which the jury assessed damages would have occurred. The majority, pointing to testimony by one expert witness that had the windows not been negligently designed no injuries whatsoever would have been incurred, apparently adheres to this supposition. *See* maj. op. *infra* at 32. However, this ignores the testimony of another expert, who was unwilling to speculate as to whether the injuries received by some of the plaintiffs occurred inside or outside the van.[5] If the injuries were suffered inside the van, they would have occurred regardless of the allegedly defective window system. Moreover, the majority's hypothesis assumes that the jury drew the same conclusion as the one expert, an inference which, as I view it, is impermissible for an appellate court to make.

In attempting to buttress its position, the majority notes that Alexander Maldonado, the one passenger who was not ejected, suffered only minor scratches and bruises. However, the evidence suggests that Maldonado escaped injuries by falling into the space beneath the dashboard, an area capable of protecting only one person.[6] Not only is it uncertain that a reasonably safe, alternative window design would have prevented the ejection of the plaintiffs — in fact, there was considerable evidence to the contrary[7] — but it is far from clear

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5. *See* J.A. 1125-26.
6. *See* Defendants-Appellants Reply Brief at 22.
7. *See* JA 2173-75; 2297-2303; 2569-71.

that plaintiffs' fate, had they managed to stay inside the vehicle, would have resembled that of Maldonado.

While the rationale underlying the crashworthiness theory — that manufacturers should be liable for accidents regardless whether the defect actually *caused* or merely *enhanced* the damages — has merit,[8] such a theory was not intended to impose upon manufacturers the duty to produce a vehicle incapable of exacerbating injuries.[9] Rather, liability under the crashworthiness theory extends only to the injuries that a safer, economically feasible design reasonably would have prevented — that is, had the window retention system been somewhat sturdier and more resilient. *Cf. Dawson v. Chrylser Corp.* 630 F.2d 950 (3d Cir. 1980). Such a theory of liability, as articulated in *Huddell,* requires a remand for an assessment of damages for injuries suffered solely on account of the negligent design in the window retention system.

II.

The second aspect of the majority opinion which I find disquieting is the analysis of the crashworthiness claim that the trial court originally adopted and that the majority accepts today. For the district court, in removing all seat belt considerations from the case,[10] and the majority here, in agreeing that "it would have been irrelevant for the jury to consider the use of seat belts in deciding whether the window retention system was negligently designed," appear to have misconstrued the concept of crashworthiness. Simply acknowledging that the jury found the negligently designed window retention system to have proximately caused the plaintiffs' in-

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8. *Issacson v. Toyota Motor Sales,* 438 F. Supp. 1, 7 (E.D. N.C. 1976).

9. *See* Sklar, *"Second Collision" Liability: The Need for Uniformity,* 4 Seton Hall L. Rev. 499, 527 (1973).

10. *See* Trial Transcript p. 7759.

juries, as the majority seems to do, does not relieve us from the obligation of posing the prior inquiry: was it error for the trial judge to eliminate totally the presence of seat belts from the jury's considerations of the crashworthiness of the van?

I fully agree that North Carolina law, as set forth in *Miller v. Miller*, 273 N.C. 268, 160 S.E.2d 65, 70 (1968), precluded in this type case a contributory negligence defense with respect to the initial accident based on a failure to wear seat belts. But *Miller* in no way prohibits the introduction of evidence concerning the presence of seat belts insofar as such evidence pertains to the reasonableness of the van design for purposes of the crashworthiness or second collision theory. Indeed, the district judge attempted to adhere to this view in his early instructions to the jury. He explained:

> To the extent that seat belts are relevant at all in this case, their relevance is only as to whether or not it was reasonable for those who designed the retention power of these windows to assume, if they did assume, that occupants of Volkswagens, type 2 van, would wear seat belts. . . .
>
> In other words, in deciding whether or not there was negligence in the design of the window, you have a right to take into consideration whether or not in designing the window the architects or the designers took into account that people would be wearing seat belts and perhaps even more importantly for this case, whether or not, if they did assume people would be wearing seat belts, such an assumption was reasonable on their part. Trial transcript 2103-04.

Even this perspective — which focuses on the rationality of VW's assumption that people might wear seat belts — may be an unduly narrow view of the crashworthiness concept.

For the question of defectiveness for purposes of a crashworthiness analysis is a uniquely *contextual* one. As Judge Aldisert stated for the Court in *Huddell v. Levin:*

> Ordinarily, where a product malfunctions and itself precipitates injury, there is little problem in establishing a defect; the issue frequently is whether the defect is traceable to the defendant manufacturer. . . . However, in a crashworthy case, impugning the design of the product in question, the difficulties are reversed. There can be no doubt that the design of the product is traceable to the manufacturer. The central issue is: was the product "defective"? And this can only be evaluated in the context of a particular risk.

537 F.2d at 740.

Thus, for the jury to determine whether the window system was reasonably designed for the purposes for which it was sold requires expanding the scope of inquiry beyond the abstract seatbelt-window design relationship. An evaluation of the possible defectiveness of the window system, in light of the vehicle as a whole and in the particular circumstances of a rollover, is necessary.

Similar to the test advanced by Judge Aldisert in *Huddell,* other courts have also emphasized that the jury be instructed in resolving defective design issues to consider the vehicle as a *whole* in the context of a given accident. Thus, in *Dreisonstok v. Volkswagen, A.G., supra,* in which plaintiffs sued for enhanced injuries sustained when a VW microbus crashed into a telephone pole, the court noted that any crashworthy case necessarily involves a balancing of many factors — including price, particular type of vehicle, and circumstances of the accident — "to determine whether the manufacturer had used ordinary care in designing a car, which, giving consideration to the market purposes and utility of the vehi-

cle, did not involve unreasonable risk of injury to occupants . . ." 489 F.2d at 1073. And as the court in *Dyson v. General Motors Corp.* recognized, the differentiation between various models means "that a convertible can not be made as safe in roll-over accidents as a standard four-door sedan with center posts and full-door frames." 298 F. Supp. 1064, 1073 (E.D. Pa. 1969). To the same effect, in *Wilson v. Volkswagen of America*, 445 F. Supp. 1368 (E.D. Va. 1978), which involved a single car rollover, the court viewed crashworthiness as a holistic, contextual concept: "any vehicle should be made as safe as it reasonably can, considering its special purpose and 'intended use'; but standards of safety themselves must take into account the utility of the vehicle." 445 F. Supp. at 1372. Crashworthiness then relates back to the reasonableness of the entire vehicle at the time of its manufacture, although it is necessarily assessed in the context of an actual accident, which may not have been foreseeable.[11]

With respect to the crashworthiness claim before us, the existence of seat belts was relevant to the question of reasonableness of the window design in the context of a rollover accident. For this reason, the ruling by the district court that totally removed such evidence from the jury, constitutes error.[12] The majority opinion

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11. Contrary to the majority's suggestion, the *Wilson* case is cited only for the proposition that a jury should give cognizance to the full design of the automobile, including safety factors, in determining whether an automobile is crashworthy. There is no intent to adopt the *Wilson* court's mitigation of damages analysis which limited evidence on the non-use of seat belts to the determination of damages. As the trial court made clear crashworthiness and mitigation of damages are two clearly distinct concepts.

12. The very rationale for admitting evidence pertaining to Safety Standard 212, namely that although VW was not bound by the standard, it was a jury question whether adherence to the standard constituted reasonableness in design, see Trial Transcript 7754-55, should similarly dictate admission of the seat belt evidence. Although plaintiffs were not bound to wear seat belts, evidence of their availability and non-use would properly be factors for the jury to consider in assessing crashworthiness.

has excerpted a portion of the pointed interchange between the district court and VW's expert witness, Mr. Pohl, in which Mr. Pohl stated that the window retention system was designed without regard to whether the occupants would be wearing seat belts. *See* maj. op. *supra* at 17-18. This colloquy formed the basis for the court's conclusion that, inasmuch as Volkswagen, in designing its windshield and window retention system, did not assume that occupants would be wearing seat belts, evidence relating to the availability of seat belts was improper. *See* Trial Transcript at 7759. Given the *Huddell* directive and the above discussion of crashworthiness, however, this assumption does not dispose of the question whether in the context of this particular risk — a rollover at a high speed — the window design plus the existence of the seat belts provided a reasonably crashproof vehicle.

While Mr. Pohl's response is arguably subject to several interpretations, no possible construction justifies removing all seat belt considerations from the jury's determination of crashworthiness. The statement by Mr. Pohl plausibly suggested that VW neither assumed that passengers would nor assumed they would not wear seat belts. It says nothing about whether in a high-speed rollover situation seatbelts are perhaps the most reasonable and efficient means of protecting against injuries, and whether any window design can guard against accidents of such severity. In fact, examination of the entire course of Pohl's testimony manifests a position that it was unreasonable to rely upon the windows to retain occupants in a rollover accident.[13] It would therefore, at least to me, appear improper on the crashworthiness issue to remove evidence regarding the availability of seatbelts and the reasonableness of plaintiffs' nonuse of them from the jury based on the isolated statement of an

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13. *See* JA 2173-75; 2292; 2297-2303; 2569-71; 2575-76.

expert witness that the VW window retention system was designed without regard to whether occupants would or would not be wearing seat belts.

III.

As the entire concept of crashworthiness indicates, each vehicle constitutes a special design and each accident constitutes a rather singular circumstance, often posing problems not easily analogized to earlier torts cases. The consequent difficulty in providing comprehensive standards to govern such a range of contingencies coupled with continuing technological advances and design modifications, may explain why Congress did not intend federal motor vehicle safety standards to be all-inclusive. As we acknowledged in *Dawson v. Chrysler Corp., supra,* Congress explicitly provided that " 'Compliance with any Federal motor vehicle safety standard issued under this subchapter [National Traffic and Motor Vehicle Safety Act] does not exempt any person from any liability under common law.' 15 U.S.C. §1397(c) (1976)." 630 F.2d 950, 958 (3d Cir. 1980). Yet the problems generated by the present case ultimately serve to underscore the perception in *Dawson:* the existing system for assessing liability and compensating injuries in automobile accident cases, which permits individual juries under different state systems to arrive at discrepant outcomes that impose conflicting standards on manufacturers, is far from efficient or fair.

The case before us illustrates the inefficiencies and inequities created by the uneven evolution of state tort law doctrines and the absence of uniform federal standards in the automobile field. The conscientious efforts of the district court here to anticipate the course of North Carolina tort law proved futile. A state supreme court decision handed down after the trial was completed peremptorily negated a careful attempt at judicial extrapolation. Divergent state tort laws produce similarly

arbitrary, stochastic outcomes for injured plaintiffs. Had the accident occurred in any state but North Carolina, and two others which have not yet adopted section 402A of the Restatement, a strict liability cause of action would have been available. And predictability and uniformity in the governing law, quite obviously, would have eliminated many of the difficulties which confront us on this appeal.

As we indicated in *Dawson*, the irrationalities in the existing system affect the automobile manufacturers as well. The ultimate effect of jury verdicts which reach beyond federal safety standards and are arrived at under different state laws, is the imposition of conflicting requirements on producers attempting to satisfy a nationwide market. In the course of the present trial VW found itself caught between Scylla and Charybdis, so to speak. On the one hand, VW's obligations were measured by national statistics which are arguably inappropriate for this type accident or this type van.[14] On the other hand, the jury assessing liability was guided by insufficiently articulated state law. Yet, VW is now bound by this jury verdict, arrived at under North Carolina law and based on potentially inapplicable federal standards, a verdict which may prove to be at variance with what some later jury in another state decides. The absence of precise and comprehensive national standards, exacerbated by the vagaries of different states' laws, leaves us far from the goal of reducing and fairly distributing the sum of accident costs as well as the costs of reducing the number of future collisions.

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14. It is still unclear whether the Fatal Accident Reporting System (FARS) data relied upon here, while perhaps relevant, are derived from accidents analogous to the one in issue. *See* Trial transcript 1595-1603. Nor is it certain that the Federal Motor Vehicle Safety Standard 212, 49 C.F.R. §571.212 (1978) introduced in the proceedings below, was intended to apply at all to the Type II van. *See* Trial transcript 1603, 7754-55.

It would appear, then, that injured parties, manufacturers and the public would all benefit from greater certainty and consistency in the governing law and the concommitant efficiency in its administration. Indeed, manufacturers might well consent to more rigorous safety standards in exchange for a guarantee that they would be applied nationwide in an evenhanded manner. And equally important, the public would benefit from a concerted attempt to reach a national consensus on the conflicting goals of productivity, energy conservation and passenger safety.

Unfortunately, given the existing adjudicative system, I am compelled to comment primarily upon the appropriateness of a remand for a reassessment of damages, and to point out why it appears necessary to retry the crashworthiness claim to permit incorporation of seat belt evidence into the jury assessment of the reasonableness of the vehicle's design.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Appellees,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation and THOMAS S. WEIR, an individual,

Appellants.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Volkswagenwerk, A.G. and Volkswagen of America, Inc. in the above en-

Appendix B

titled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active serivce, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

(ILLEGIBLE)
Judge

Dated: June 26, 1981

APPENDIX C

Relevant Statutes

UNITED STATES CONSTITUTION

ARTICLE VI.—DEBTS VALIDATED. SUPREME LAW OF LAND

• • •

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

• • •

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

• • •

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Appendix C

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

15 U.S.C. § 1381. Congressional declaration of purpose

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

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15 U.S.C. § 1392. Motor vehicle safety standards—Establishment

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehcle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in the objective terms.

Appendix C

Applicability of Administrative Procedure Act

(b) The Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.

Effective date of orders

(c) Each order establishing a Federal motor vehicle safety standard shall specify the date such standard is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date such order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such findings.

Supremacy of federal standards; allowable higher standards for vehicles used by federal or state governments

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a

higher standard of performance than that required to comply with the otherwise applicable Federal standard.

Amendment and revocaton of standards

(e) The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

Factors to be considered in prescribing standards

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * *

15 U.S.C. § 1394. Judicial review of orders establishing standards; additional evidence before Secretary; certified copy of transcript

(a)(1) In a case of actual controversy as to the validity of any order under section 1392 of this title, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of Title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason

of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the order in accordance with section 1009 of Title 5 and to grant appropriate relief as provided in such section.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(5) Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary of[1] any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(b) A certified copy of the transcript of the record and proceedings under this section shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, exclusion of imports, or other proceeding arising under or in respect of this subchapter, irrespective of whether proceedings with respect to the order have previously been initiated or become final under subsection (a) of this section.

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[1] So in orginal.

Appendix C

15 U.S.C. § 1397

Prohibition against manufacture, sale, delivery, or importation of substandard vehicles and against rendering inoperative certain devices, elements of design or motor vehicle equipment—Access to record; certificate; notification of defect; "motor vehicle repair business" defined; exemptions from inoperation restriction; exemption of safety belt interlocks and continuous buzzers.

* * *

Continuation of common law liability

(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

* * *

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

Appendix C

28 U.S.C. § 2072. Rules of civil procedure.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. • • •

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Federal Rules of Civil Procedure. Rule 47. Jurors

(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of

prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) Alternate Jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

Appendix C

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Sudivision (a). This permits a practice found very useful by federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn. xxxiii (1932), 3 Minn.Stat. (Mason, Supp. 1936) Appendix 4, p. 1062.

Note to Subdivision (b). The provision for an alternate juror is one often found in modern state codes. See N.C. Code (1935) § 2330(a); Ohio Gen.Code Ann. (Page, Supp. 1926-1935) § 11419-47; Pa.Stat.Ann. (Purdon, Supp. 1936) Title 17, § 1153; compare U.S.C., Title 28, § 417a (Alternate jurors in criminal trials); 1 N.J.Rev.Stat. (1937) 2:91A-1, 2:91A-2, 2:91A-3.

Provisions for qualifying, drawing, and challenging of jurors are found in U.S.C., Title 28, former:

§ 411 (Qualifications and exemptions)

§ 412 (Manner of drawing)

§ 413 (Apportioned in district)

§ 415 (Not disqualified because of race or color)

§ 416 (Venire; service and return)

§ 417 (Talesman for petit jurors)

§ 418 (Special juries)

§ 423 (Jurors not to serve more than once a year)

§ 424 (Challenges)

and D.C.Code (1930) Title 18, §§ 341-360 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges).

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1966 AMENDMENT

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of the Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number to a maximum of six in all cases. The Advisory Committee's Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn."

* * *

Federal Rules of Criminal Procedure. Rule 24. Trial Jurors.

* * *

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same func-

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tions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (c). This rule embodies existing law, 28 U.S.C. former § 417a (Alternate jurors), as well as the practice prescribed for civil cases by Rule 47(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, except that the number of possible alternate jurors that may be impaneled is increased from two to four, with a corresponding adjustment of challenges.

1966 AMENDMENT

Experience has demonstrated that four alternate jurors may not be enough for some lengthy criminal trials. See *e.g., United States* v. *Bentvena,* 288 F.2d 442 (2d Cir. 1961); Reports of the Proceedings of the Judicial Conference of the United States, 1961, p. 104. The amendment to the first sentence increases the number authorized from four to six. The fourth sentence is amended to provide an ad-

ditional peremptory challenge where a fifth or sixth alternate juror is used.

The words "or are found to be" are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn. See *United States* v. *Goldberg,* 330 F.2d 30 (3rd Cir. 1964), cert. den. 377 U.S. 953 (1964).

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49 C.F.R. Part 571—Federal Motor Vehicle Safety Standards.

SUBPART A—GENERAL

Sec.

571.1 Scope.

571.3 Definitions.

571.4 Explanation of usage.

571.5 Matter incorporated by reference.

571.7 Applicability.

571.8 Effective date.

571.9 Separability.

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SUBPART B—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Sec.

571.101-80 Standard No. 101; Controls and displays.

571.102 Standard No. 102; Transmission shift lever sequence, starter interlock, and transmission braking effect.

571.103 Standard No. 103; Windshield defrosting and defogging systems.

571.104 Standard No. 104; Windshield wiping and washing systems.

571.105 Standard No. 105; Hydraulic brake systems.

571.106 Standard No. 106; Brake hoses.

571.107 Standard No. 107; Reflecting surfaces.

571.108 Standard No. 108; Lamps, reflective devices, and associated equipment.

571.109 Standard No. 109; New pneumatic tires.

571.110 Standard No. 110; Tire selection and rims.

571.111 Standard No. 111; Rearview mirrors.

571.112 Standard No. 112; Headlamp concealment devices.

571.113 Standard No. 113; Hood latch system.

571.114 Standard No. 114; Theft protection.

571.115 Standard No. 115; Vehicle identification number.

571.116 Standard No. 116; Motor vehicle brake fluids.

571.117 Standard No. 117; Retreaded pneumatic tires.

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Sec.

571.118 Standard No. 118; Power-operated window systems.

571.119 Standard No. 119; New pneumatic tires for vehicles other than passenger cars.

571.120 Standard No. 120; Tire selection and rims for motor vehicles other than passenger cars.

571.121 Standard No. 121; Air Brake Systems.

571.122 Standard No. 122; Motorcycle brake systems.

571.123 Standard No. 123; Motorcycle controls and displays.

571.124 Standard No. 124; Accelerator control systems.

571.125 Standard No. 125; Warning devices.

571.126 Standard No. 126; Truck-camper loading.

571.127 Standard No. 127; Speedometers and odometers. (Effective Sept. 1, 1981.)

571.201 Standard No. 201; Occupant protection in interior impact.

571.202 Standard No. 202; Head restraints.

571.203 Standard No. 203; Impact protection for the driver from the steering control system.

571.204 Standard No. 204; Steering control rearward displacement.

571.205 Standard No. 205; Glazing materials.

571.206 Standard No. 206; Door locks and door retention components.

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Sec.

571.207 Standard No. 207; Seating systems.

571.208 Standard No. 208; Occupant crash protection. (Effective Sept. 1, 1981.)

571.209 Standard No. 209; Seat belt assemblies.

571.210 Standard No. 210; Seat belt assembly anchorages.

571.211 Standard No. 211; Wheel nuts, wheel discs, and hub caps.

571.212 Standard No. 212; Windshield mounting.

571.213 Standard No. 213; Child restraint systems.

571.214 Standard No. 214; Side door strength.

571.215 [Reserved]

571.216 Standard No. 216; Roof crush resistance-passenger cars.

571.217 Standard No. 217; Bus window retention and release.

571.218 Standard No. 218; Motorcycle helmets.

571.219 Standard No. 219; Windshield zone intrusion.

571.220 Standard No. 220; School bus rollover protection.

571.221 Standard No. 221; School bus body joint strength.

571.222 Standard No. 222; School bus passenger seating and crash protection.

571.301 Standard No. 301; Fuel system integrity.

571.302 Standard No. 302; Flammability of interior materials.

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49 C.F.R. § 571.207. Standard No. 207; Seating systems.

S1. *Purpose and scope.* This standard establishes requirements for seats, their attachment assemblies, and their installation to minimize the possibility fo their failure by forces acting on them as a result of vehicle impact.

S2. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks and buses.

S3. *Definition.* "Occupant seat" means a seat that provides at least one designated seating position.

S4. *Requirements.*

S4.1 *Driver's seat.* Each vehicle shall have an occupant seat for the driver.

S4.2 *General performance requirements.* When tested in accordance with S5, each occupant seat, other than a side-facing seat or a passenger seat on a bus, shall withstand the following forces.

(a) In any position to which it can be adjusted—20 times the weight on the seat applied in a forward longitudinal direction;

(b) In any position to which it can be adjusted—20 times the weight of the seat applied in a rearward longitudinal direction;

(c) For a seat belt assembly attached to the seat—the force specified in paragraph (a), if it is a forward facing seat, or paragraph (b), if it is a rearward facing seat, in each case applied simultaneously with the forces imposed

on the seat by the seat belt assembly when it is loaded in accordance with S4.2 of § 571.210; and

(d) In its rearmost position—a force that produces a 3,300 inch-pound moment about the seating reference point for each designated seating position that the seat provides, applied to the upper cross-member of the seat back or the upper seat back in a rearward longitudinal direction for forward-facing seats and in a forward longitudinal direction for rearward-facing seats.

S4.2.1 *Seat adjustment.* Except for vertical movement of nonlocking suspension type occupant seats in trucks or buses, the seat belt shall remain in its adjusted position during the application of each force specified in S4.2.

S4.3 *Restraining device for hinged or folding seats or seat backs.* Except for a passenger seat in a bus or a seat having a back that is adjustable only for the comfort of its occupants, a hinged or folding occupant seat or occupant seat back shall be equipped with a self-locking device for restraining the hinged or folding seat or seat back and a control for releasing that restraining device.

S4.3.1 *Accessibility of release control.* If there is a designated seating position immediately behind a seat equipped with a restraining device, the control for releasing the device shall be readily accessible to the occupant of the seat equipped with the device and, if access to the control is required in order to exit from the vehicle, to the occupant of the designated seating position immediately behind the seat.

S4.3.2 *Performance of restraining device.*

Appendix C

S4.3.2.1 *Static force.*

(a) Once engaged, the restraining device for forward-facing seat shall not release or fail when a forward longitudinal force equal to 20 times the weight of the hinged or folding portion of the seat is applied through the center of gravity of that portion of the seat.

(b) Once engaged, the restraining device for a rearward facing seat shall not release or fail when a rearward longitudinal force equal to 8 times the weight of the hinged or folding portion of the seat is applied to the center of gravity of that portion of the seat.

S4.3.2.2 *Acceleration.* Once engaged, the restraining device shall not release or fail when the device is subjected to an acceleration of 20 g., in the longitudinal direction opposite to that in which the seat folds.

S4.4 *Labeling.* Seats not designated for occupancy while the vehicle is in motion shall be conspicuously labeled to that effect.

S5. *Test procedures.*

S5.1 Apply the forces specified in S4.2(a) and S4.2(b) as follows:

S5.1.1 If the seat back and the seat bench are attached to the vehicle by the same attachments, secure a strut on each side of the seat from a point on the outside of the seat frame in the horizontal plane of the seat's center of gravity to a point on the frame as far forward as possible of the seat anchorages. Between the upper ends of the struts place a rigid cross-member, in front of the seat back frame

for rearward loading and behind the seat back frame for forward loading. Apply the force specified by S4.2(a) or S4.2(b) horizontally through the rigid crossmember as shown in figure 1.

S5.1.2 If the seat back and the seat bench are attached to the vehicle by different attachments, attach to each component a fixture capable of transmitting a force to that component. Apply forces equal to 20 times the weight of the seat back horizontally through the center of gravity of the seat back, as shown in figure 2, and apply forces equal to 20 times the weight of the seat bench horizontally through the center of gravity of the seat bench, as shown in figure 3.

S5.2 Develop the moment specified in S4.2(d) as shown in figure 4.

S5.3 Apply the forces specified in S4.3.2.1(a) and (b) to a hinged or folding seat as shown in figure 1 and to a hinged or folding seat back as shown in figure 5.

S5.4 Determine the center of gravity of a seat or seat component with all cushions and upholstery in place and with the head restraint in its fully extended design position.

49 C.F.R. § 571.208. Standard No. 208; Occupant crash protection. (Effective Sept. 1, 1981).

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity

of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9, *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

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S4.1.1.1 *First option—complete passive protection system.* The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

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S4.1.2 *Passenger cars manufactured from September 1, 1973, to August 31, 1983.* Each passenger car manufactured from September 1, 1973 to August 31, 1981, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, and S4.1.2.3. Each passenger car manufactured from September 1, 1981, to August 31, 1981, inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3, except that a passenger car with a wheelbase of more than 114 inches

shall meet the requirements specified in S4.1.3. Each passenger car manufactured from September 1, 1982, to August 31, 1983, inclusive shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3, except that a passenger car with a wheelbase of more than 100 inches shall meet the requirements specified in S4.1.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—Complete passive protection system.* The vehicle shall:

(a) At each front designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either; (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

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S4.5.3 *Passive belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as a "passive belt") may be used to meet the crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.

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S5. *Occupant crash protection requirements.*

S5.1 *Frontal barrier crash.* When the vehicle traveling longitudinally forward at any speed up to and including 30 mph, impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, or at any angle up to 30° in either direction from the perpendicular to the line of travel of the vehicle, under the applicable conditions of S8, with anthropomophic test devices at each designated seating position described in (a) or (b) for which a barrier crash test is required under RS4, it shall meet the injury criteria of S6. An antropomorphic test device shall be placed—

(a) In the case of a vehicle equipped with front bucket seats, at each front designated seating position; and

(b) In the case of a vehicle equipped with a front bench seat, at the driver's designated seating position and at any other one front designated seating position.

S5.2 *Lateral moving barrier crash.* When the vehicle is impacted laterally on either side by a barrier moving at 20 mph, with a test devices at the front outboard designated seating position adjacent to the impacted side, under the applicable conditions of S8., it shall meet the injury criteria of S6.2 and S6.3.

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S5.3 *Rollover.* When the vehicle is subjected to a rollover test in either lateral direction at 30 mph with a test device in the front outboard designated seating position on its lower side as mounted on the test platform, under the applicable conditions of S8, it shall meet the injury criteria of S6.1.

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S7. *Seat belt assembly requirements—passenger cars.*

S7.1 *Adjustment.*

S7.1.1 Except as specified in S7.1.1.1 and S7.1.1.2, the lap belt of any seat belt assembly furnished in accordance with S4.1.1 and S4.1.2 shall adjust by means of an emergency-locking or automatic-locking retractor that conforms to § 571.209 to fit persons whose dimensions range from those of a 50th-percentile 6-year-old child to those of a 95th-percentile adult male and the upper torso restraint shall adjust by means of an emergency-locking retractor or a manual adjusting device that conforms to § 571.209 to fit persons whose dimensions range from those of a 5th-percentile adult female to those of a 95th-percentile adult male, with the seat in any position and the seat back in the manufacturer's nominal design riding position. However, an upper torso restraint furnished in accordance with S4.-1.2.3.1(a) shall adjust by means of an emergency-locking retractor that conforms to Standard No. 209.

S7.1.1.1 A seat belt assembly installed at the driver's seating position shall adjust to fit persons whose dimensions range from those of a 5th-percentile adult female to those of a 95th-percentile adult male.

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S7.1.1.2(a) A seat belt assembly installed in a motor vehicle other than a forward control vehicle at any designated seating position other than the outboard positions of the front and second seats shall adjust either by a retractor as specified in § 7.1.1. or by a manual adjusting device that conforms to § 571.209.

(b) A seat belt assembly installed in a forward control vehicle at any designated seating position other than the front outboard seating positions shall adjust either by a retractor as specified in § 7.1.1 or by a manual adjusting device that conforms to § 571.209.

S7.1.2 The intersection of the upper torso belt with the lap belt in any Type 2 seat belt assembly furnished in accordance with S4.1.1 or S4.1.2, with the upper torso manual adjusting device, if provided, adjusted in accordance with the manufacturer's instructions, shall be at least 6 inches from the front vertical centerline of a 50th-percentile adult male occupant, measured along the centerline of the lap belt, with the seat in its rearmost and lowest adjustable position and with the seat back in the manufacturer's nominal design riding position.

S7.1.3 The weights and dimensions of the vehicle occupants specified in this standard are as follows:

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(b) *Multipurpose passenger vehicles, trucks, and buses.* A multipurpose passenger vehicle, truck, or bus is loaded to its unloaded vehicle weight plus 300 pounds or its rated cargo and luggage capacity weight, whichever is less, secured in the load carrying area and distributed as nearly as possible in proportion to its gross axle weight ratings,

plus the weight of the necessary anthropomorphic test devices.

S8.1.2 Adjustable seats are in the adjustment position midway between the forwardmost and rearmost positions, and if separately adjustable in a vertical direction, are at the lowest position. If an adjustment position does not exist midway between the forwardmost and rearmost positions, the closest adjustment position to the rear of the midpoint is used.

S8.1.3 Adjustable seat backs are in the manufacturer's nominal design riding position. If a nominal position is not specified, the seat back is positioned so that the accelerometer surface in the dummy head, as positioned in the vehicle, is horizontal. If the vehicle is equipped with adjustable head restraints, each is adjusted to its highest adjustment position.

S8.1.4 Adjustable steering controls are adjusted so that the steering wheel hub is at the geometric center of the locus it describes when it is moved through its full range of driving positions.

S8.1.5 Movable vehicle windows and vents are in the fully closed position.

S8.1.6 Convertibles and open-body type vehicles have the top, if any, in place in the closed passenger compartment configuration.

S8.1.7 Doors are fully closed and latched but not locked.

S8.1.8 Anthropomorphic test devices used for the evaluation of restraint systems manufactured pursuant to sec-

tions S4.1.2.1 and S4.1.2.2 conform to the requirements of Part 572 of this title.

S8.1.9 Each test dummy is clothed in formfitting cotton stretch garments with short sleeves and midcalf length pants. Each foot of the dummy is equipped with a size 11EE shoe which meets the configuration, size, sole, and heel thickness specifications of MIL-S-13192 and weighs 1.25 ± 0.2 pounds.

S8.1.10 Limb joints are set at lg, barely restraining the weight of the limb when extended horizontally. Leg joints are adjusted with the torso in the suppine position.

S8.1.11 *Dummy placement in vehicles.* Anthropomorphic test dummies are placed in the vehicle in accordance with S8.1.11.1 and S8.1.11.2, and except as otherwise specified, the dummies are not restrained during an impact by any means that require occupant action.

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S8.3 *Rollover test conditions.* The following conditions apply to the rollover test.

S8.3.1 The tested vehicle's brakes are disengaged and the transmission is in neutral.

S8.3.2 The concrete surface on which the test is conducted is level, rigid, of uniform construction, and of a sufficient size that the vehicle remains on its throughout the entire rollover cycle. It has a skid number of 75 when measured in accordance with American Society for Testing and Materials Method E-274-65T at 40 m.p.h. omitting water delivery as specified in paragraph 7.1 of that method.

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S8.3.3 The vehicle is placed on a device, similar to that illustrated in Figure 2, having a platform in the form of a flat, rigid plane at an angle of 23° from the horizontal. At the lower edge of the platform is an unyielding flange, pependicular to the platform with a height of 4 inches and a length sufficient to hold in place the tires that rest against it. The intersection of the inner face of the flange with the upper face of the platform is 9 inches above the rollover surface. No other restraints are used to hold the vehicle in position during the deceleration of the platform and the departure of the vehicle.

S8.3.4 With the vehicle on the test platform, the test devices remain as nearly as possible in the posture specified in S8.1.

S8.3.5 Before the deceleration pulse, the platform is moving horizontally, and perpendicularly to the longitudinal axis of the vehicle, at a constant speed of 30 m.p.h. for a sufficient period of time for the vehicle to become motionless relative to the platform.

S8.3.6 The platform is decelerated from 30 to 0 m.p.h. in a distance of not more than 3 feet, without change of direction and without transverse or rotational movement during the deceleration of the platform and the departure of the vehicle. The deceleration rate is at least 20g for a minimum of 0.04 seconds.

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49 C.F.R. § 571.209. Standard No. 209; Seat belt assemblies.

S1. *Purpose and scope.* This standard specifies requirements for seat belt assemblies.

S2. *Application.* This standard applies to seat belt assemblies for use in passenger cars, multipurpose passenger vehicles, trucks and buses.

S3. *Definitions.* "Seat belt assembly" means any strap, webbing, or similar device designed to secure a person in a motor vehicle in order to mitigate all necessary buckles and other fasteners, and all hardware designed for installing such seat belt assembly in a motor vehicle.

"Pelvic restraint" means a seat belt assembly or portion thereof intended to restrain movement of the pelvis.

"Upper torso restraint" means a portion of a seat belt assembly intended to restrain movement of the chest and shoulder regions.

"Hardware" means any metal or rigid plastic part of a seat belt assembly.

"Buckle" means a quick release connector which fastens a person in a seat belt assembly.

"Attachment hardware" means any or all hardware designed for securing the webbing of a seat belt assembly to a motor vehicle.

"Adjustment hardware" means any or all hardware designed for adjusting the size of a seat belt assembly to fit the user, including such hardware that may be integral with a buckle, attachment hardware, or retractor.

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"Retractor" means a device for storing part or all of the webbing in a seat belt assembly.

"Nonlocking retractor" means a retractor from which the webbing is extended to essentially its full length by a small external force, which provides no adjustment for assembly length, and which may or may not be capable of sustaining restraint forces at maximum webbing extension.

"Automatic-locking retractor" means a retractor incorporating adjustment hardware by means of a positive self-locking mechanism which is capable when locked of withstanding restraint forces.

"Emergency-locking retractor" means a retractor incorporating adjustment hardware by means of a locking mechanism that is activated by vehicle acceleration, webbing movement relative to the vehicle, or other automatic action during an emergency and is capable when locked of withstanding restraint forces.

"Seat back retainer" means the portion of some seat belt assemblies designed to restrict forward movement of a seat back.

"Webbing" means a narrow fabric woven with continuous filling yarns and finished selvages.

"Strap" means a narrow nonwoven material used in a seat belt assembly in place of webbing.

"Type 1 seat belt assembly" is a lap belt for pelvic restraint.

"Type 2 seat belt assembly" is a combination of pelvic and upper torso restraints.

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"Type 2a shoulder belt" is an upper torso restraint for use only in conjunction with a lap belt as a Type 2 seat belt assembly.

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49 C.F.R. § 571.212. Standard No. 212; Windshield mounting.

S1. *Scope.* This standard establishes windshield retention requirements for motor vehicles during crashes.

S2. *Purpose.* The purpose of this standard is to reduce crash injuries and fatalities by providing for retention of the vehicle windshield during a crash, thereby utilizing fully the penetration-resistance and injury-avoidance properties of the windshield glazing material and preventing the ejection of occupants from the vehicle.

S3. *Application.* This standard applies to passenger cars, and to multi-purpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.

S4. *Definition.* "Passive restraint system" means a system meeting the occupant crash protection requirements of S5 of Standard No. 208 by means that require no action by vehicle occupants.

S5. *Requirements.* When the vehicle traveling longitudinally forward at any speed up to and including 30 mph impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, under the condi-

tions of S6, the windshield mounting of the vehicle shall retain not less than the minimum portion of the windshield periphery specified in S5.1 and S5.2.

S5.1 *Vehicles equipped with passive restraints.* Vehicles equipped with passive restraint systems shall retain not less than 50 percent of the portion of the windshield periphery on each side of the vehicle longitudinal centerline.

S5.2 *Vehicles not equipped with passive restraints.* Vehicles not equipped with passive restraint systems shall retain not less than 75 percent of the windshield periphery.

S6. *Test conditions.* The requirements of S5 shall be met under the following conditions:

S6.1 The vehicle, including test devices and instrumentation, is loaded as follows:

(a) Except as specified in S6.2, a passenger car is loaded to its unloaded vehicle weight plus its cargo and luggage capacity weight, secured in the luggage area, plus a 50th-percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating position and at any other position whose protection system is required to be tested by a dummy under the provisions of Standard No. 208. Each dummy is restrained only by means that are installed for protection at its seating position.

(b) Except as specified in S6.2, a multipurpose passenger vehicle, truck, or bus is loaded to its unloaded vehicle weight, plus 300 pounds or its rated cargo and luggage capacity, whichever is less, secured to the vehicle, plus a 50th-percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating posi-

tion and at any other position whose protection system is required to be tested by a dummy under the provisions of Standard No. 208. Each dummy is restrained only by means that are installed for protection at its seating position. The load is distributed so that the weight on each axle as measured at the tire-ground interface is in proportion to its GAWR. If the weight on any axle when the vehicle is loaded to its unloaded vehicle weight plus dummy weight exceeds the axle's proportional share of the test weight, the remaining weight is placed so that the weight on that axle remains the same. For the purposes of this section, unloaded vehicle weight does not include the weight of work-performing accessories. Vehicles are tested to a maximum unloaded vehicle weight of 5,500 pounds.

S6.2 The fuel tank is filled to any level from 90 to 95 percent of capacity.

S6.3 The parking brake is disengaged and the transmission is in neutral.

S6.4 Tires are inflated to the vehicle manufacturer's specifications.

S6.5 The windshield mounting material and all vehicle components in direct contact with the mounting material are at any temperature between 15° F and 110° F.

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49 C.F.R. § 571.219. Standard No. 219; Windshield zone intrusion.

S1. *Scope.* This standard specifies limits for the displacement into the windshield area of motor vehicle components during a crash.

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S2. *Purpose.* The purpose of this standard is to reduce crash injuries and fatalities that result from occupants contacting vehicle components displaced near or through the windshild.

S3. *Application.* This standard applies to passenger cars and to multi-purpose passenger vehicles, trucks and buses of 10,000 pounds or less gross vehicle weight rating. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body-type vehicles with fold-down or removable windshields.

S4. *Definitions.* "Daylight Opening" (DLO) means the maximum unobstructed opening through the glazing surface, including reveal or garnish moldings adjoining the surface, as measured parallel to the outer surface of the glazing material.

S5. *Requirement.* When the vehicle traveling longitudinally forward at any speed up to and including 30 mph impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, under the conditions of S7, no part of the vehicle outside the occupant compartment, except windshield molding and other components designed to be normally in contact with the windshild, shall penetrate the protected zone template, affixed according to S6, to a depth of more than one-quarter inch, and no such part of a vehicle shall penetrate the inner surface of that portion of the windshield, within the DLO, below the protected zone defined in S6.

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49 C.F.R. § 571.301. Standard No. 301; Fuel system integrity.

S1. *Scope.* This standard specifies requirements for the integrity of motor vehicle fuel systems.

S2. *Purpose.* The purpose of this standard is to reduce deaths and injuries occurring from fires that result from fuel spillage during and after motor vehicle crashes.

S3. *Application.* This standard applies to passenger cars, and to multi-purpose passenger vehicles, trucks, and buses that have a GVWR of 10,000 pounds or less and use fuel with a boiling point above 32° F, and to schoolbuses that have a GVWR greater than 10,000 pounds and use fuel with a boiling point about 32° F.

S4. *Definition.* "Fuel spillage" means the fall, flow, or run of fuel from the vehicle but does no tinclude wetness resulting from capillary action.

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EXHIBIT D

Complaint

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 77-1413

(Filed—July 14, 1977)

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New York Corporation and THOMAS S. WEIR, an individual,

Defendants.

Plaintiffs, Barry Lynn Seese, Reinaldo Irizarry, Jr., Martin Ramos, and Marcos Torres, Administrator for the Estate of Jose Torres, Deceased, claim damages of the Defendants, Volkswagenwerk, A.G., Volkswagen of America, Inc., and Thomas S. Weir, upon a cause of action of which the following is a statement.

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1. Jurisdiction of this Court in the causes of action herein is founded upon diversity of citizenship of the parties and the amount in controversy which is in excess of Ten Thousand and 00/100 ($10,000.00) Dollars in each and every cause of action, exclusive the costs and interest.

2. Plaintiff, Barry Lynn Seese, is a citizen of the Commonwealth of Pennsylvania residing at Daleville Mobile Home Park, Daleville-Grinersville Road, Cochranville, Pennsylvania.

3. Plaintiff, Reinaldo Irizarry, Jr., is a citizen of the State of New York, residing at 904 Harding Park, Bronx, New York.

4. Plaintiff, Martin Ramos, is a citizen of the State of North Carolina, residing at 326 Sterling Road, Jacksonville, North Carolina.

5. Plaintiff, Marcos Torres, is the father of Jose Torres, Deceased, and is a citizen of the State of New York, residing at 731 East 166 Street, Bronx, New York. On the 22nd day of April, 1977, Letters of Administration were granted to him by the Surrogate's Court in and for the County of Kings, State of New York, appointing him Administrator of the Estate of his son, Jose Torres, Deceased.

6. Defendant, Volkswagenwerk, A.G., is a corporation organized and existing under and by virtue of the laws of the Federal Republic of Germany, having its principal place of business located in Wolfsburg, West Germany.

7. At all times material to the within cause of action, Defendant, Volkswagenwerk, A.G., (hereinafter referred to as VWAG), was engaged in and doing business in the States of New Jersey and North Carolina and in the United States of America, specifically having designed, manufactured, assembled, advertised, distributed, and sold automobiles and automotive parts in interstate commerce to dealers in New Jersey and North Carolina and elsewhere in the United States of America for resale to the general public.

8. Defendant, Volkswagen of America, Inc., (hereinafter referred to as VWOA), is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in Englewood Cliffs, New Jersey.

9. At all times material to the within cause of action, the Defendant, VWOA, was engaged in doing business in the States of New Jersey and North Carolina and elsewhere in the United States of America for resale to the general public.

10. On or about July 18, 1975, Plaintiff, Martin Ramos, was lawfully operating a 1974 Volkswagen Bus, Vehicle Identification No. 2242077246 with the permission of its owner, Louis Noel Colon, in an easterly direction 2.1 miles east of Havelock, Craven County, North Carolina, on Rural Postal Route 1756, also known as Nine Mile Road.

11. Plaintiff, Barry Lynn Seese, Reinaldo Irizarry, Jr., and Plaintiff's Decedent, Jose Torres, were passengers in said Volkswagen Bus at said time and place.

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12. While said Volkswagen automobile was being operated as aforesaid it became unstable, went off the road surface, went out of control and rolled over, causing the Plaintiffs to suffer the injuries and damages hereinafter set forth.

13. Said automobile was designed, manufactured, assembled, advertised, and sold by the Defendant, VWAG.

14. Said automobile was assembled, marketed, distributed, advertised, and sold by the Defendant VWOA.

15. The injuries and damages sustained by the Plaintiffs as hereinafter set forth were proximately caused by the defective design, manufacture and assembly of the Volkswagen automobile herein involved and by reason of the failure of the internal mechanisms of the automobile to perform safely under the circumstances.

16. The Defendants sold the said automobile in the aforesaid defective condition which rendered the said automobile unreasonably dangerous to the Plaintiffs, at a time when the Defendants were each engaged in the business of selling such automobiles and when the Plaintiffs had a right to and did rely on the superior skill and knowledge of the Defendants in designing, manufacturing and assembling said Volkswagen automobile, and as to each Defendant, the said automobile was expected to and did in fact reach the Plaintiffs without substantial change in the condition in which it was sold.

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COUNT I

BARRY LYNN SEESE, Plaintiff v. VOLKSWAGENWERK, A.G., and VOLKSWAGEN OF AMERICA, INC., Defendants

Strict Liability

17. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 2, and 6 through 16 inclusive, to the same force and effect as if same were herein set forth fully at length.

18. As a direct and proximate result of the foregoing, Defendants are each liable to the Plaintiff in this cause of action based upon the theory of strict liability as set forth in the Restatement of Torts 2, §402(A) for the following reasons:

A. In designing, manufacturing, and selling a vehicle which suffered a lack of inherent controllability and stability, including, but not limited to, its steering, brakes, and suspension system;

B. In designing, manufacturing, and selling a vehicle which had a deficient and defective braking system;

C. In designing, manufacturing and selling a vehicle which had a deficient and defective steering system;

D. In designing, manufacturing and selling a vehicle which had a deficient and defective suspension system;

E. In designing, manufacturing and selling a vehicle which was deficient and defective in its interior protection mechanisms, in that the passenger compartment was not crashworthy;

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F. In designing, manufacturing and selling a vehicle which lacked adequate structural strength so as to maintain the integrity of the passenger compartment and prevent the ejection of passengers in the event of a collision and/or rollover;

G. In designing, manufacturing and selling a vehicle equipped with a defective rear axle;

H. In failing to warn the Plaintiff of the defects and dangers which the Defendants knew or should have known existed in the subject vehicle;

I. In failing to warn the Plaintiff of the structural and design limitations of the subject vehicle;

J. In failing to warn the Plaintiff of the structural and design defects inherent in the subject vehicle;

K. In selling a vehicle which did not conform to the minimum standards as required by Federal, State and local laws, rules, regulations, and ordinances and national industry standards; and

L. In designing, manufacturing and selling a vehicle which suffered from defects in design and performance.

19. In addition, the Defendants are each strictly liable to the Plaintiff upon a cause of action as set forth in the Restatement of Torts 2d §402(B), in that they each made to the Plaintiff through advertising and other means misrepresentations of material facts concerning the character and quality of the aforesaid Volkswagen automobile, at a time when each of the Defendants was engaged in the business of selling said automobiles.

20. As a result of the Defendants' actions as aforesaid, Plaintiff, Barry Lynn Seese, has suffered the following injuries, some or all of which are permanent in nature:

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A. Multiple head trauma (comatose);

B. Brain stem contusion;

C. Multiple abrasions, contusions and lacerations;

D. Deep ragged undercut laceration of the right olecranon;

E. Internal abdominal trauma and bleeding;

F. Central hyperventilation respiratory pattern;

G. Dislocation of left radial head;

H. Aspiration pneumonia;

I. Shock to the nerves and nervous system; and

J. Other serious injuries of a permanent and disabling nature.

21. As a result of the injuries as aforesaid, Plaintiff, Barry Lyn Seese, sustained the following damages:

A. Traumatic encephalopathy

B. Irreversible brain stem contusion;

C. Permanent and irreversible hemiparesis involving the entire left side of the body;

D. Permanent impairment and deformation of the left arm with the functional loss of range of motion and grasp;

E. Permanent scarring of the left and right elbows;

F. Permanent and irreversible disorder of gait;

G. Permanent and irreversible impairment of equilibrium;

H. Permanent and irreversible impairment of balance and stance;

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I. Permanent and irreversible impairment of speech;

J. Permanent and irreversible impairment of eyesight;

K. Permanent and irreversible impairment of hearing;

L. Permanent and irreversible blunting of the emotions of daily life, such as, but not limited to, emphatic, sensitive and discerning reponses;

M. Diminution of sexual drive;

N. Loss of the command of social situations that would normally lead to healthy and natural sexual expression;

O. Vulnerability to falls and other serious injuries because of the inability to comprehend, see, hear and respond to the normal warnings of danger encountered in everyday life situations;

P. Loss of the ability to think rapidly, intellectually, and in a consistent direction, and to integrate new information or provide fresh interpretation of old memories;

Q. Loss of diminution in judgment, reason, insight, abstractability, and the ability to perceive the world around him;

R. Permanent destruction of healthy brain tissue including, but not limited to, memory impairment and the ability to perceive his environment in a normal manner;

S. Great pain, suffering, inconvenience, embarrassment, and mental anguish;

T. Loss of earnings and earning capacity in the past and in the future;

U. The requirement to expend in the past and in the future large sum of money for surgical and medical atten-

tion, hospitalization, supplies, appliances, medicines, and attendant servicse;

V. Permanent disfigurement; and

W. Impairment of general health, strength, vitality, and the enjoyment of life.

WHEREFORE, Plaintiff, Barry Lynn Seese, demands judgment against the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severally; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

COUNT II

BARRY LYNN SEESE, Plaintiff v. VOLKSWAGENWERK, A.G., and VOLKSWAGEN OF AMERICA, INC., Defendants

Negligence

22. Plaintiff, Barry Lynn Seese, hereby incorporates by reference all of the allegations contained in paragraphs 1, 2, and 6 through 16 inclusive, to the same force and effect as if same were herein set forth fully at length.

23. The injuries and damages sustained by the Plaintiff were directly and proximately caused by and were the result of the negligence of the Defendants in the following particulars:

A. In designing, manufacturing, and selling a vehicle which suffered a lack of inherent controllability and sta-

bility, including, but not limited to, its steering, braking, and suspension systems;

B. In designing, manufacturing, and selling a vehicle which had a deficient and defective braking system;

C. In designing, manufacturing, and selling a vehicle which had a deficient and defective steering system;

D. In designing, manufacturing, and selling a vehicle which had a deficient suspension system;

E. In designing, manufacturing, and selling a vehicle which was deficient and defective in its interior protection systems in that the passenger compartment was not crashworthy;

F. In designing, manufacturing, and selling a vehicle which lacked adequate structural strength to maintain the integrity of the passenger compartment and to prevent ejection of passengers in the event of a collision or rollover;

G. In designing, manufacturing, and selling a vehicle equipped with a defective rear axle;

H. In failing to warn Plaintiff of the defects and dangers which Defendants knew or should have known existed;

I. In failing to warn Plaintiff of the structural and design limitations of the vehicle;

J. In failing to warn Plaintiff of the structural and design defects inherent in the vehicle;

K. In selling a vehicle which did not conform to the minmium standards as required by Federal, State and local laws, rules, regulations and ordinances and national industry standards;

L. In designing, manufacturing, and selling a vehicle which suffered from defects in design and in performance;

M. In manufacturing, assembling and selling a defective vehicle when they knew or should have know that said vehicle was dangerous to its users, in wanton and reckless disregard for human life and safety;

N. In failing to recall and correct such defective vehicles when they knew or should have known said vehicles were defective in wanton and reckless disregard for human life and safety; and

O. In otherwise failing to exercise due care under the circumstances.

24. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 20 and 21 to the same force and effect as if same were herein set forth fully at length.

WHEREFORE, Plaintiff, Barry Lynn Seese, claims compensatory damages from the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severely; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT III

REINALDO IRIZARRY, JR., Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Strict Liability

25. Plaintiff, Reinaldo Irizarry, Jr., hereby incorporates by reference all of the allegations contained in paragraphs 1, 3, 6 through 16, and 18 and 19, inclusive, to the same force and effect as if same were herein set forth fully at length.

26. As a result of Defendants' actions as aforesaid, Plaintiff has suffered the following injuries, some or all of which are permanent in nature:

A. Quardiplegia secondary to cervical cord fracture, C7-T1 level;

B. Linear skull and basilar skull fracture, left temporal region with otorphra;

C. Left 6th nerve palsy;

D. Pulmonary and cardiac contusion;

E. Fractured left clavicle;

F. Ruptured spleen;

G. Appendicitis;

H. Hyperventilation syndrome;

I. Bruises, contusions, abrasions and lacerations;

J. Shock to the nerves and nervous system; and

K. Other serious injuries of a permanent and disabling nature.

27. As a result of the injuries as aforesaid, Plaintiff sustained the following damages:

A. Permanent quadriplega;

B. Mental anguish;

C. Loss of the use of his arms;

D. Loss of the use of his legs;

E. Loss of sexual function;

F. Loss of bladder function;

G. Loss of bowel function;

H. A shortening of his life expectancy;

I. Loss of the ability to ambulate;

J. Great pain, suffering, embarrassment, and inconvenience;

K. The requirement to spend in the past and in the future large sums of money for surgical and medical attention, hospitalization, medical supplies, surgical appliances, medicines, and attendant services;

L. Loss of earnings and earning capacity in the past and in the future; and

M. Loss of general health, strength, vitality and the expectation of the enjoyment of a normal life.

WHEREFORE, Plaintiff Reinaldo Irizarry, Jr., demands judgment against the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severely; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT IV

REINALDO IRIZARRY, JR., Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Negligence

28. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 3, 6 through 16, 23, and 26 and 27, inclusive, to the same force and effect as if same were herein set forth fully at length.

WHEREFORE, Plaintiff, Reinaldo Irizarry, Jr., claims compensatory damages of the Defendants, Volkswagenwerk, A.G., and Volkswagen of America, Inc., jointly and severely; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

COUNT V

MARTIN RAMOS, Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Strict Liability

29. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 4, 6 through 16, 18, and 19, inclusive, to the same force and effect as if same were herein set forth fully at length.

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30. As a result of the Defendants' actions as aforesaid, Plaintiff has suffered the following injuries, some or all of which are permanent in nature:

A. Fractures of the left and right hands;

B. Fractures of the right leg;

C. Injury to the left side of the face;

D. Bruises, abrasions, contusions, and lacerations;

E. Injury to the left rib cage;

F. Shock to the nerves and nervous system;

G. Injury to the eyes; and

H. Other serious injuries of a permanent and disabling nature.

31. As a result of the injuries as aforesaid, Plaintiff sustained the following damages:

A. He has suffered and will suffer great pain, suffering, inconvenience, embarrassment, and mental anguish;

B. He has and will be required to expend in the future, large sums of money for surgical and medical attention, hospitalization, medical supplies, surgical appliances, medicines, and attendant services;

C. He has been and will be in the future deprived of his earnings;

D. His earning capacity has been reduced and permanently impaired;

E. He has been disfigured; and

F. His general health, strength, and vitality have been impaired.

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WHEREFORE, Plaintiff, Martin Ramos, demands judgment against the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severally; or, in the alternative, against any one of them, in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest, and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

COUNT VI

MARTIN RAMOS, Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Negligence

32. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 4, 6 through 16, 23, 30, and 31, inclusive, to the same force and effect as if same were set forth herein fully al length.

WHEREFORE, Plaintiff, Martin Ramos, claims compensatory damages from the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severally; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

Appendix D

COUNT VII

MARCOS TORRES, Administrator for the Estate of JOSE TORRES, DECEASED, Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Strict Liability

33. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 5 through 16, 18, and 19, inclusive, to the same force and effect as if same were set forth herein fully at length.

34. As a result of the Defendants' actions as aforesaid, Plaintiff's Decedent, Jose Torres, died on July 18, 1975.

35. Plaintiff brings this cause of action under and pursuant to §§28A-18-1 (Survival Action) and §§28A-18-2 (Wrongful Death Action) of the General Statutes of the State of North Carolina; under and pursuant to §§2A:15-3, *et seq.* (Survival Action) and §§2A:31-1 (Wrongful Death Action) of the New Jersey Statutes Annotated; and §11-3.2 of the Estates, Powers and Trusts Law of the State of New York (Survival Action) and §5-4.1 of the Estates, Powers and Trusts Law of the State of New York (Wrongful Death Action), and claims:

A. Expenses for care, treatment, and hospitalization incident to the injury resulting in the death of Plaintiff's Decedent;

B. Compensation for pain and suffering of Plaintiff's Decedent;

C. Reasonable funeral expenses of Plaintiff's Decedent;

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D. The present monetary rules of the Decedent to the persons entitled to receive damages recovered, including but not limited to, compensation for the loss of the reasonably expected:

(1) Net income of the Decedent;

(2) Service, protection, care, and assistance of the Decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered;

(3) Society, companionship, comfort, guidance, friendly offices, consortium, and advice of Plaintiff's Decedent to the persons entitled to the damages recovered;

E. Such compensatory and punitive damages as the Decedent would have recovered had he survived; and

F. Punitive damages for wrongfully causing the death of the Decedent through malicious, wilful and wanton conduct and gross disregard for the safety of passengers in the subject vehicle and like vehicles.

WHEREFORE, Plaintiff, Marcos Torres Administrator of the Estate of Jose Torres, deceased demands judgment against the Defendants, Volkwagenwerk, A.G. and Volkswagen of America, Inc., jointly and severally; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT VIII

MARCOS TORRES, Administrator for the Estate of JOSE TORRES, DECEASED, Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Negligence

36. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 5 through 16, 23, 34, and 35, inclusive, to the same force and effect as if same were set forth herein fully at length.

37. Plaintiff further specifically alleges that the damages, injury and death of Plaintiff's Decedent were directly and proximately caused by and were the result of the negligence of the Defendants as set forth hereinabove and the gross negligence, maliciousness, wilful and wanton misconduct of the Defendants as set forth hereinabove.

WHEREFORE, Plaintiff, Marcos Torres, Administrator of the Estate of Jose Torres, Deceased, claims compensatory damages from the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severely; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest, and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT IX

BARRY LYNN SEESE, Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Breach of Warranty

38. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 2, 6 through 16, 20, and 21, inclusive, to the same force and effect as if same were set forth herein fully at length.

39. Plaintiff further specifically alleges that the injuries and damages sustained by him were directly and proximately caused by and were the result of breaches of expressed and implied warranties by the Defendants, VWOA and VWAG, such as, but not limited to: the warranty of merchantability, the warranty of fitness for particular intended purpose, and the warranty that the subject 1974 Volkswagen bus was effective, proper and safe for its intended use, the safe transportation of its occupants.

WHEREFORE, Plaintiff, Barry Lynn Seese, demands judgment against the Defendants, Volkswagen, A.G. and Volkswagen of America, Inc., jointly and severally; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT X

REINALDO IRIZARRY, JR., Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Breach of Warranty

40. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 3, 6 through 16, 26, and 27, inclusive, to the same force and effect as if same were set forth herein fully at length.

41. Plaintiff further specifically alleges that the injuries and damages sustained by him were directly and proximately caused by and were the result of breaches of expressed and implied warranties by the Defendants, VWOA and VWAG, such as, but not limited to: the warranty of merchantability, the warranty of fitness for particular intended purpose, and the warranty that the subject 1974 Volkswagen bus was effective, proper, and safer for its intended use, the safe transportation of its occupants.

WHEREFORE, Plaintiff, Reinaldo Irizarry, Jr., demands judgment against the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severely; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest, and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT XI

MARTIN RAMOS, Plaintiff v. VOLKSWAGENWERK, A.G., and VOLKSWAGEN OF AMERICA, INC., Defendants

Breach of Warranty

42. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 4, 6 through 16, 30, and 31, inclusive, to the same force and effect as if same were set forth herein fully at length.

43. Plaintiff further specifically alleges that the injuries and damages sustained by him were directly and proximately caused by and were the result of breaches of expressed and implied warranties by the Defendants, VWOA and VWAG, such as, but not limited to: the warranty of merchantability, the warranty of fitness for particular intended purpose, and the warranty that the subject 1974 Volkswagen bus was effective, proper, and safe for its intended use, the safe transportation of its occupants.

WHEREFORE, Plaintiff, Martin Ramos, demands judgment against the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severely; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT XII

MARCOS TORRES, Adiminstrator for the Estate of JOSE TORRES, DECEASED, Plaintiff v. VOLKSWAGENWERK, A.G. and VOLKSWAGEN OF AMERICA, INC., Defendants

Breach of Warranty

44. Plaintiff hereby incorporates by reference all of the allegations contained in paragraphs 1, 5, 6 through 16, 34, and 35, inclusive, to the same force and effect as if same were set forth herein fully at length.

45. Plaintiff further specifically alleges that the injuries, damages and death sustained by Plaintiff's Decedent, Jose Torres, were directly and proximately caused by and were the result of breaches of expressed and implied warranties by the Defendants, VWOA and VWAG, such as, but not liimted to: the warranty of merchantability, the warranty of fitness for particular intended purpose, and the warranty that the subject 1974 Volkswagen bus was effective, proper, and safe for its intended use, the safe transportation of its occupants.

WHEREFORE, Plaintiff, Marcos Torres, Administrator for the Estate of Jose Torres, Deceased, claims compensatory damages of the Defendants, Volkswagenwerk, A.G. and Volkswagen of America, Inc., jointly and severely; or, in the alternative, against any one of them in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest, and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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COUNT XIII

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Plaintiffs v. THOMAS S. WEIR, an individual

Negligence

46. Defendant, Thomas S. Weir, is a citizen of the State of New Jersey, residing at 226 Fairmount Road, Ridgewood, Bergen County, New Jersey.

47. Plaintiffs hereby incorporate by reference all of the allegations contained in paragraphs 1, 2, 3, 4, 5, 10, 11, 12, 20, 21, 26, 27, 30, 31, 34, and 35, to the same force and effect as if same were set forth herein fully at length.

48. On July 18, 1975, Defendant, Thomas S. Weir, was operating his 1973 Datson, Model 240Z, automobile in a westerly direction 2.1 miles east of Havelock, Craven County, North Carolina, on Rural Postal Route 1756, also known as Nine Mile Road, when said Defendant caused his vehicle to cross the center line and enter Plaintiffs' lane of travel, causing Plaintiffs' vehicle to take evasive action by leaving said road and entering the berm on its right.

49. As a direct and proximate result of the aforesaid acts of the Defendant, Plaintiffs suffered the severe and serious personal injuries set forth hereinabove.

50. The injuries and damages suffered by Plaintiffs as set forth hereinabove were caused by and were the direct and proximate result of the negligence of the Defendant, Thomas S. Weir, in the following respects:

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A. He operated his automobile at a high, dangerous, and reckless rate of speed under the circumstances;

B. He failed to keep his automobile under proper control;

C. He continued to operate his automobile in a direction towards the Plaintiffs when he knew or, in the exercise of reasonable diligence, should have known that further operation in that direction would force Plaintiffs off the road;

D. He failed to be attentive and to maintain a sharp lookout of the road and the conditions of traffic;

E. He failed to sound a horn or other warning of the approach of his automobile;

F. He caused his automobile to cross the center line of said Nine Mile Road into the lane of oncoming traffic in which Plaintiffs were traveling;

G. He failed to maintain his automobile in proper mechanical condition;

H. He failed to operate the brakes with which his automobile was equipped in a manner so that his automobile could be stopped before forcing Plaintiffs off said road;

I. He failed to stop within the assured, clear distance in front of Plaintiffs' vehicle;

J. He failed to drive around Plaintiffs' vehicle to avoid forcing said vehicle off said road;

K. He violated the various laws, statutes, and municipal ordinances pertaining to the operation of motor vehicles on public thoroughfares under the circumstances;

L. He failed to observe that due care and caution required under the circumstances; and

M. He was negligent as a matter of law.

WHEREFORE, Plaintiffs, Barry Lynn Seese, Reinaldo Irizarry, Jr., Martin Ramos, and Marcos Torres, Administrator for the Estate of Jose Torres, Deceased, demand judgment against the Defendant, Thomas S. Weir, jointly and severely; or, in the alternative, against him alone, in an amount in excess of Ten Thousand and 00/100 ($10,000.00) Dollars, plus punitive damages, interest and costs of suit.

A TRIAL BY JURY IS HEREBY DEMANDED.

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Local Counsel for all Plaintiffs

APPENDIX E

Answer, Crossclaim, Counterclaim and Jury Demand, Docket No. 77-1113

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
(Hon. Herbert J. Stern)

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New York Corporation and THOMAS S. WEIR, an individual,

Defendants.

Defendant, Volkswagenwerk AG, a foreign corporation, with its principal place of business located at Wolfsburg, West Germany, by way of answer to the Complaint, does allege and say:

1. Defendant, Volkswagenwerk AG (hereinafter sometimes referred to as "VWAG") does not possess sufficient knowledge or information upon which to form a belief with

respect to the truth of the allegations set forth in Paragraps 1, 2, 3, 4, 5, 10, 11, 12, 14 of the Compaint and leaves the plaintiffs to their proofs thereon.

2. Defendant VWAG neither admits nor denies the allegations set forth in Paragraphs 8, 9 and 14 of the Complaint in that they do not apply to defendant VWAG.

3. Defendant VWAG admits the allegations set forth in Paragraph 6 of the Complaint.

4. Defendant VWAG denies each and every allegation set forth in Paragraph 7 of the Complaint.

5. Defendant VWAG denies each and every allegation set forth in Paragraph 15 and 16 of the Complaint.

COUNT I

6. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 2 and 6 through 16 inclusive of the Complaint as though the same were set forth herein at length.

7. Defendant VWAG denies each and very allegation set forth in Paragraph 18, and 18A through 18L inclusive, of the Complaint.

8. Defendant VWAG denies each and every allegation set forth in Paragraph 19 of the Complaint.

9. Defendant VWAG denies each and every allegation set forth in Paragraph 20 and 20A through 20J inclusive, of the Complaint.

10. Defendant VWAG denies each and every allegation set forth in Paragraph 21, and 21A through 21W inclusive of the Complaint.

COUNT II

11. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 2 and 6 through 16 inclusive of the Complaint as though the same were set forth herein at length.

12. Defendant VWAG denies each and every allegation set forth in Paragraph 23, and 23A through 23O inclusive, of the Complaint.

13. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 20 and 21 of the Complaint as though the same were set forth herein at length.

COUNT III

14. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 3, 6 through 16 and 18 and 19, inclusive, of the Complaint as though the same were set forth herein at length.

15. Defendant VWAG denies each and every allegation set forth in Paragraph 26, and 26A through 26M inclusive, of the Complaint.

COUNT IV

16. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 3, 6 through

16, 23 and 26 and 27, as though the same were set forth herein at length.

COUNT V

17. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 4, 6 through 16, 18 and 19, inclusive, as though the same were set forth herein at length.

18. Defendant VWAG denies each and every allegation set forth in Paragraph 30, and 30A through 30H inclusive, of the Complaint.

19. Defendant VWAG denies each and every allegation set forth in Paragraph 31, and 31A through 31F inclusive, of the Complaint.

COUNT VI

20. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 4, 6 through 16, 23, 30 and 31, inclusive, as though the same were set forth herein at length.

COUNT VII

21. Defendant VWAG repeats its answer to each and every allegation set forth in Paragraphs 1, 5 through 16, 18, and 19, inclusive, as though the same were set forth herein at length.

22. Defendant VWAG denies each and every allegation set forth in Paragraph 34 of the Complaint.

Appendix E

23. Defendant VWAG denies each and every allegation set forth in Paragraph 35 and 35A through 35F inclusive, of the Complaint.

COUNT VIII

24. Defendant VWAG repeats its answer to each and every allegation set forth in Paragraphs 1, 5 through 16, 23, 34 and 35, inclusive, as though the same were set forth herein at length.

25. Defendant VWAG denies each and every allegation set forth in Paragraph 37 of the Complaint.

COUNT IX

26. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 2, 6 through 16, 20 and 21, inclusive, of the Complaint as though the same were set forth herein at length.

27. Defendant VWAG denies each and every allegation set forth in Paragraph 39 of the Complaint.

COUNT X

28. Defendant VWAG repeats its answer to each and every allegation set forth in Paragraphs 1, 3, 6 through 16, 26 and 27, inclusive, of the Complaint as though the same were set forth herein at length.

29. Defendant VWAG denies each and every allegation set forth in Paragraph 41 of the Complaint.

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COUNT XI

30. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 4, 6 through 16, 30, and 31, inclusive, as though the same were set forth herein at length.

31. Defendant VWAG denies each and every allegation set forth in Paragraph 43 of the Complaint.

COUNT XII

32. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 5, 6 through 16, 34, and 35, inclusive, of the Complaint as though the same were set forth herein at length.

33. Defendant VWAG denies each and every allegation set forth in Paragraph 45 of the Complaint.

COUNT XIII

34. Defendant VWAG does not possess sufficient knowledge or information upon which to form a belief with respect to the truth of the allegations set forth in Paragraphs 46, 48, 49, 50 and 50A through 50M, inclusive, of the Complaint and leaves the plaintiffs to their proofs thereon.

35. Defendant VWAG repeats its answers to each and every allegation set forth in Paragraphs 1, 2, 3, 4, 5, 10, 11, 12, 20, 21, 26, 27, 30, 31, 34, and 35, of the Complaint as though the same were set forth herein at length.

Appendix E

FIRST SEPARATE DEFENSE

Defendant VWAG alleges that with respect to plaintiffs' claims for relief, the plaintiffs have failed to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the sole negligence of the plaintiffs.

THIRD SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the contributory negligence of the plaintiffs.

FOURTH SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the plaintiffs assuming a risk.

FIFTH SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the sole negligence of a third party over whom the defendant VWAG had no control.

Appendix E

SIXTH SEPARATE DEFENSE

Plaintiffs are barred from recovery against the defendant VWAG because plaintiffs failed to give said defendant VWAG notice of the alleged defects.

SEVENTH SEPARATE DEFENSE

Plaintiffs are barred from recovery for lack of compliance with the terms of the express warranty.

EIGHTH SEPARATE DEFENSE

Plaintiffs are barred from recovery because of misuse of the product.

NINTH SEPARATE DEFENSE

Any amount plaintiffs may recover shall be reduced in proportion to the amount of negligence attributable to plaintiffs.

TENTH SEPARATE DEFENSE

The claim alleged by the plaintiffs are hereby barred by the applicable Statute of Limitations.

ELEVENTH SEPARATE DEFENSE

The claims alleged by the plaintiffs herein are barred due to the lack of personal jurisdiction over defendant VWAG.

Appendix E

Twelfth Separate Defense

The claims alleged by the plaintiffs herein are barred due to the insufficiency of service of process upon defendant VWAG.

Wherefore, defendant Volkwagenwerk AG hereby demands the entry of judgment in its favor and against the plaintiffs, dismissing the Complaint with prejudice, together with costs of suit.

Crossclaim

Defendant, Volkswagenwerk AG by way of crosselaim against defendant Thomas S. Weir, does allege and say:

1. While denying that it is any way obligated or liable under the claims for relief asserted against it, defendant, VWAG, alleges that any obligation imposed upon it to respond in damages can only be as a result of the operation of law, based upon liability, technical, imputed or implied, whereas the actual fault and negligence was against defendant, Thomas S. Weir, against whom this claim is asserted.

Wherefore, defendant Volkswagenwerk AG, demands judgment of indemnification from co-defendant, Thomas S. Weir.

Claim for Contribution

Defendant, Volkswagenwerk AG, hereby makes a demand and claim for contribution against defendant Thomas S. Weir under the terms and provisions of the Joint Tort Feasors Contribution Act, as amended.

Appendix E

Counterclaim

Defendant, Volkswagenwerk AG, (hereinafter referred to as "VWAG") with offices located in Wolfsburg, West Germany, by way of Counterclaim against plaintiff, Martin Ramos, does allege and say:

Count I

1. On July 18, 1975, the vehicle in question referred to in plaintiff's Complaint was being operated by Martin Ramos, the plaintiff herein and defendant on the Counterclaim.

2. Plaintiff, Martin Ramos, was negligent in his operation of said vehicle in that he failed to maintain control of his vehicle because he was travelling at an excessive rate of speed and was otherwise inattentive and careless, which negligence caused the vehicle to leave the road on which it was travelling and resulted in the accident in question.

Wherefore, while denying that VWAG is in any way obligated or liable for the claims asserted against it, defendant VWAG demands judgment under the terms and provisions of the applicable Joint Tort Feasors Contribution Act.

Count II

3. Defendant, VWAG, repeats each and every allegation contained in Paragraphs 1 and 2 of its Counterclaim as though each and every allegation were set forth herein at length.

4. While denying that it is in any way obligated or liable for the claims for relief asserted against it by the plaintiffs, the defendant, VWAG, alleges that any obligation imposed upon it to respond in damages can only be as the result of the operation of law, based upon liability, technical, imputed or implied, whereas the actual fault in negligence was that of plaintiff, Martin Ramos, against whom this claim is asserted.

WHEREFORE, VWAG, demands judgment of indemnification from plaintiff, Martin Ramos.

DEMAND FOR TRIAL BY JURY

Defendant, Volkswagenwerk AG, hereby demands a trial by jury of twelve (12) as to all issues.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Defendant
Volkswagenwerk AG
By: DAVID J. SHEEHAN

Dated: April 4, 1979

APPENDIX F

Answer, Crossclaim, Counterclaim and Jury Demand, Docket No. 77-1413

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Hon. Herbert J. Stern)

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New York Corporation and THOMAS S. WEIR, an individual,

Defendants.

Defendant, Volkswagen of America, Inc., a New Jersey corporation, with offices located at 818 Sylvan Avenue, Englewood Cliffs, New Jersey, by way of answer to the Complaint, does allege and say:

Appendix F

1. Defendant Volkswagen of America, Inc. (hereinafter sometimes rreferred to as "VWOA") does not possess sufficient knowledge or information upon which to form a belief with respect to the truth of the allegations set forth in Paragraph 1, 2, 3, 4, 5, 10, 11, 12 and 14 of the Complaint and leaves the plaintiffs to their proofs thereon.

2. Defendant VWOA neither admits nor denies the allegations set forth in Paragraph 6, 7 and 13 of the Complaint in that they do not apply to defendant VWOA.

3. Defendant VWOA admits the allegations set forth in Paragraph 8 of the Complaint, except to deny that it is a corporation organized and existing under and by virtue of the laws of the State of New York.

4. Defendant VWOA denies each and every allegation set forth in Paragraph 9 of the Complaint except to admit that it does do business in the State of New Jersey.

5. Defendant VWOA denies each and every allegation set forth in Paragraphs 15 and 16 of the Complaint.

COUNT I

6. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 2, and 6 through 16 inclusive of the Complaint as though the same were set forth herein at length.

7. Defendant VWOA denies each and every allegation set forth in Paragraph 18, and 18A through 18L inclusive, of the Complaint.

8. Defendant VWOA denies each and every allegation set forth in Paragraph 19 of the Complaint.

9. Defendant VWOA denies each and every allegation set forth in Paragraph 20 and 20A through 20J inclusive, of the Complaint.

10. Defendant VWOA denies each and every allegation set forth in Paragraph 21, 21A through 21W inclusive, of the Complaint.

COUNT II

11. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 2 and 6 through 16 inclusive of the Complaint as though the same were set forth herein at length.

12. Defendant VWOA denies each and every allegation set forth in Paragraph 23, 23A through 230 inclusive, of the Complaint.

13. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraph 20 and 21 of the Complaint as though the same were set forth herein at length.

COUNT III

14. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 3, 6 through 16 and 18 and 19, inclusive, of the Complaint as though the same were set forth herein at length.

Appendix F

15. Defendant VWOA denies each and every allegation set forth in Paragraph 26, and 26A through 26M inclusive, of the Complaint.

COUNT IV

16. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 3, 6 through 16, 23, and 26 and 27, as though the same were set forth herein at length.

COUNT V

17. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 4, 6 through 16, 18, and 19, inclusive, as though the same were set forth herein at length.

18. Defendant VWOA denies each and every allegation set forth in Paragraph 30, and 30A through 30H inclusive, of the Complaint.

19. Defendant VWOA denies each and every allegation set forth in Paragraph 31, and 31A through 31F inclusive, of the Complaint.

COUNT VI

20. Defendant VWOA repeats its answer to each and every allegation set forth in paragraphs 1, 4, 6 through 16, 23, 30 and 31, inclusive, as though the same were set forth herein at length.

Appendix F

Count VII

21. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 5 through 16, 18, and 19, inclusive, as though the same were set forth herein at length.

22. Defendant VWOA denies each and every allegation set forth in Paragraph 34 of the Complaint.

23. Defendant VWOA denies each and every allegation set forth in Paragraph 35, and 35A through 35F inclusive, of the Complaint.

Count VIII

24. Defendant VWOA repeats its answer to each and every allegation set forth in paragraphs 1, 5 through 16, 23, 34 and 35, inclusive, as though the same were set forth herein at length.

25. Defendant VWOA denies each and every allegation set forth in Paragraph 37 of the Complaint.

Count IX

26. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 2, 6 through 16, 20, and 21, inclusive, of the Complaint as though the same were set forth herein at length.

27. Defendant WVOA denies each and every allegation set forth in Paragraph 39 of the Complaint.

Appendix F

COUNT X

28. Defendant WVOA repeats its answers to each and every allegation set forth in paragraphs 1, 3, 6 through 16, 26 and 27, inclusive, of the Complaint as though the same were set forth herein at length.

29. Defendant VWOA denies each and every allegation set forth in Paragraph 41 of the Complaint.

COUNT XI

30. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 4, 6 through 16, 30, and 31, inclusive, as though the same were set forth herein at length.

31. Defendant VWOA denies each and every allegation set forth in Paragraph 43 of the Complaint.

COUNT XII

32. Defendant VWOA repeats it answers to each and every allegation set forth in Paragraphs 1, 5, 6 through 16, 34, and 35, inclusive, of the Complaint as though the same were set forth herein at length.

33. Defendant VWOA denies each and every allegation set forth in paragraph 45 of the Complaint.

COUNT XIII

34. Defendant VWOA does not possess sufficient knowledge or information upon which to form a belief with re-

spect to the truth of the allegations set forth in Paragraphs 46, 48, 49, 50, and 50A through 50M inclusive, of the Complaint and leaves the plaintiffs to their proofs thereon.

35. Defendant VWOA repeats its answers to each and every allegation set forth in Paragraphs 1, 2, 3, 4, 5, 10, 11, 12, 20, 21, 26, 27, 30, 31, 34, and 35, of the Complaint as though the same were set forth herein at length.

FIRST SEPARATE DEFENSE

Defendant VWOA alleges that with respect to plaintiffs' claims for relief, the plaintiffs have failed to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the sole negligence of the plaintiffs.

THIRD SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the contributory negligence of the plaintiffs.

FOURTH SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the plaintiffs assuming a risk.

Appendix F

FIFTH SEPARATE DEFENSE

Any and all acts complained of and the injuries and alleged damages resulting therefrom were the result of the sole negligence of a third party over whom the defendant VWOA had no control.

SIXTH SEPARATE DEFENSE

Plaintiffs are barred from recovery against the defendant VWOA because plaintiffs failed to give said defendant VWOA notice of the alleged defects.

SEVENTH SEPARATE DEFENSE

Plaintiffs are barred from recovery for lack of compliance with the terms of the express warranty.

EIGHTH SEPARATE DEFENSE

Plaintiffs are barred from recovery because of misuse of product.

NINTH SEPARATE DEFENSE

Any amount plaintiffs may recover shall be reduced in proportion to the amount of negligence attributable to plaintiffs.

TENTH SEPARATE DEFENSE

The claims alleged by the plaintiffs are hereby barred by the applicable Statute of Limitations.

Appendix F

WHEREFORE, defendant Volkswagen of America, Inc. hereby demands the entry of judgment in its favor and against the plaintiffs, dismissing the Complaint with prejudice, together with costs of suit.

CROSSCLAIM

Defendant, Volkswagen of America, Inc., by way of crossclaim against defendant Thomas S. Weir, does allege and say:

1. While denying that it is in any way obligated or liable under the claims for relief asserted against it, defendant, VWOA, alleges that any obligation imposed upon it to respond in damages can only be as a result of the operation of law, based upon liability, technical, imputed or implied, whereas the actual fault and negligence was against defendant Thomas S. Weir, against whom this claim is asserted.

WHEREFORE, defendant, Volkswagen of America, Inc., demands judgment of indemnification from co-defendant, Thomas S. Weir.

CLAIM FOR CONTRIBUTION

Defendant Volkswagen of America, Inc., hereby makes a demand and claim for contribution against defendant, Thomas S. Weir, under the terms and provisions of the Joint Tort Feasors Contribution Act, as amended.

Appendix F

COUNTERCLAIM

Defendant, Volkswagen of America, Inc., (hereinafter referred to as "VWOA") with offices located at 818 Sylvan Avenue, Englewood Cliffs, New Jersey, by way of Counterclaim against plaintiff, Martin Ramos, does allege and say:

COUNT I

1. On July 18, 1975, the vehicle in question referred to in plaintiffs' Complaint was being operated by Martin Ramos, the plaintiff herein and defendant on the Counterclaim.

2. Plaintiff, Martin Ramos, was negligent in his operation of said vehicle in that he failed to maintain control of his vehicle because he was travelling at an excessive rate of speed and was otherwise inattentive and careless, which negligence caused the vehicle to leave the road on which it was travelling and resulted in the accident in question.

WHEREFORE, while denying that VWOA is in any way obligated or liable for the claims asserted against it, defendant, VWOA, demands judgment under the terms and provisions of the applicable Joint Tort Feasors Contribution Act.

COUNT II

3. Defendant, VWOA, repeats each and every allegation contained in Paragraphs 1 and 2 of its Counterclaim

as thought each and every allegation were set forth herein at length.

4. While denying that it is in any way obligated or liable for the claims for relief asserted against it by the plaintiffs, the defendant, VWOA, alleges that any obligation imposed upon it to respond in damages can only be as the result of the operation of law, based upon liability, technical, imputed or implied, whereas the actual fault in negligence was that of plaintiff, Martin Ramos, against whom this claim is asserted.

WHEREFORE, VWOA, demands judgment of indemnification from plaintiff, Martin Ramos.

DEMAND FOR TRIAL BY JURY

Defendant, Volkswagen of America, Inc., hereby demands a trial by jury of twelve (12) as to all issues.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Defendant,
Volkswagen of America, Inc.
By: DAVID J. SHEEHAN

DATED: April 6, 1979

APPENDIX G

Order

(Filed—May 31, 1979)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Hon. Herbert J. Stern)

Civil Action No. 77-1413

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New York Corporation and THOMAS S. WEIR, an individual,

Defendants.

This matter being opened to the Court before the Honorable Herbert J. Stern, U.S.D.J., upon the direction of the Court that the parties review the law of New Jersey concerning the choice of law principles governing the sub-

stantive law applicable in the above captioned matter, and the attorneys for the plaintiffs, Wallace, Chapas & Ober, and the attorneys for defendants, Volkswagen of America, Inc. and Volkswagenwerk, A.G., Crummy, Del Deo, Dolan & Purcell, and the attorneys for defendant, Thomas S. Weir, Connell, Foley & Geiser, having stipulated and agreed that the substantive law of North Carolina is applicable in the above captioned matter, and the Court having found that under New Jersey's choice of law principles, the substantive law of the State of North Carolina is applicable to the above captioned matter, and for cause shown;

IT IS on this 31 day of May, 1979;

ORDERED, that the substantive law of the State of North Carolina be and hereby is applicable to the above captioned matter.

HERBERT J. STERN, U.S.D.J.

APPENDIX H

Notice of Motion of Defendants for an Order Granting an Involuntary Dismissal

(Filed—November 20, 1979)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Hon. Herbert J. Stern)

Civil Action No. 77-1413

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New York Corporation and THOMAS S. WEIR, an individual,

Defendants.

To: HENRY H. WALLACE, ESQ.
Wallace, Chapas & Ober
Suite 1712 Frick Building
Pittsburgh, Pennsylvania 15219

Appendix H

JOHN I. MCMAHON, ESQ.
Brandywine Building
King of Prussia, Pennsylvania 19406

RUSSELL S. SHARBAUGH, JR., ESQ.
Bendit, Weinstock & Sharbaugh
80 Main Street
West Orange, New Jersey 07052

SIRS:

PLEASE TAKE NOTICE that at the conclusion of the plaintiffs' direct presentation of evidence, the undersigned, attorneys for defendants, Volkswagen of America, Inc. and Volkswagenwerk, A.G., will move before the Honorable Herbert J. Stern, U.S.D.J., at the U. S. Courthouse and Post Office Building, Newark, New Jersey, for the entry of an Order granting an involuntary dismissal, pursuant to Federal Rule of Civil Procedure 41 on the plaintiffs' claims arising from their crashworthiness allegations.

PLEASE TAKE FURTHER NOTICE that at the hearing of said Motion, the undersigned shall rely upon the pleadings of record, the evidence adduced at trial on the direct presentation of the plaintiffs' case, and the Memorandum of Law submitted herewith.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Defendants,
Volkswagenwerk, A.G. and
Volkswagen of America, Inc.
By: JOHN T. DOLAN

DATED: November 19, 1979

APPENDIX I

Notice of Motion of Defendants for a Judgment N.O.V. or in the Alternative, a New Trial

(Filed—January 15, 1980)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Hon. Herbert J. Stern)

Civil Action No. 77-1413

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation and THOMAS S. WEIR, an individual,

Defendants.

To: HENRY H. WALLACE, ESQ.
Wallace, Chapas & Ober
Suite 1712 Frick Building
Pittsburgh, Pennsylvania 15219

Appendix I

JOHN I. MCMAHON, ESQ.
Brandywine Building
King of Prussia, Pennsylvania 19406

RUSSELL S. SHARBAUGH, JR., ESQ.
Bendit, Weinstock & Sharbaugh
80 Main Street
West Orange, New Jersey 07052

SIRS:

PLEASE TAKE NOTICE that the undersigned, attorneys for the defendants, Volkswagenwerk, A.G., a West German corporation, and Volkswagen of America, Inc., a New Jersey corporation, shall move before the Honorable Herbert J. Stern, U.S.D.J., at the United States Courthouse, Federal Square, Newark, New Jersey, at 10:00 a.m. on Monday, February 11, 1980 or as soon thereafter as counsel may be heard, for an Order Granting Defendants a Judgment N.O.V. or, in the alternative, a New Trial, Pursuant to Federal Rule of Civil Procedure 50.

PLEASE TAKE FURTHER NOTICE that at the hearing on the within motion defendants shall rely upon the Memorandum of Law attached hereto, and all pleadings and memoranda currently on file with the Court in this matter.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Defendants,
Volkswagenwerk, A.G. and
Volkswagen of America, Inc.
By: JOHN T. DOLAN

Dated: January 15, 1980

APPENDIX J

Judgment

(Filed—March 31, 1980)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Hon. Herbert J. Stern)

Civil Action No. 77-1413

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation and THOMAS S. WEIR, an individual,

Defendants.

This matter having come on for trial before the Honorable Herbert J. Stern, U.S.D.J., sitting with a jury, and the matter having been duly tried before said jury, and the jury having rendered a verdict on December 19, 1979 in favor of the plaintiffs and against defendants, Volks-

wagen of America, Inc. and Volkswagenwerk, A.G., in the aggregate amount of $1,950,000.00, and it appearing to the Court that said plaintiffs have previously received settlement proceeds from individuals other than the defendants herein, thereby requiring the molding of the verdict of the jury with respect to each of the plaintiffs herein, and for cause shown;

It is hereby ORDERED and ADJUDGED on this 31 day of March, 1980;

1. That plaintiff, Reinaldo Irizzary, Jr., having previously received settlement proceeds in the aggregate amount of $175,000.00, and the jury herein having awarded said plaintiff the sum of $1,000,000.00, plaintiff, Reinaldo Irizarry, Jr., is hereby entitled to recover the sum of $825,000.00 from defendants, Volkswagen of America, Inc. and Volskwagenwerk, A.G., together with interest thereon at the rate of six percent (6%) from the date of the verdict.

2. That plaintiff, Barry Lynn Seese, having previously received settlement proceeds in the aggregate amount of $175,000.00, and the jury herein having awarded said plaintiff the sum of $600,000.00, plaintiff, Barry Lynn Seese, is hereby entitled to recover the sum of $425,000.00 from defendants, Volkswagen of America, Inc. and Volkswagenwerk, A.G., together with interest thereon at the rate of six percent (6%) from the date of the verdict.

3. That plaintiff, Martin Ramos, having previously received settlement proceeds in the aggregate amount of $22,500.00, and the jury herein having awarded said plaintiff the sum of $200,000.00 plaintiff, Martin Ramos, is hereby entitled to recover the sum of $177,500.00 from defend-

ants, Volkswagen of America, Inc. and Volkswagenwerk, A.G., together with interest thereon at the rate of six percent (6%) from the date of the verdict.

4. That plaintiff, Marcos Torres, Administrator of the Estate of Jose Torres, deceased, having previously received settlement proceeds in the aggregate amount of $97,500.00, and the jury herein having awarded said plaintiff the sum of $150,000.00, plaintiff, Marcos Torres, Administrator of the Estate of Jose Torres, deceased, is hereby entitled to recover the sum of $52,500.00 from defendants, Volkswagen of America, Inc. and Volkswagenwerk, A.G., together with interest thereon at the rate of six percent (6%) from the date of the verdict.

5. That costs of suit may be taxed against defendants, Volkswagen of America, Inc. and Volkswagenwerk, A.G., in accordance with the applicable federal statutes and rules of procedure.

6. That the attorneys' fee to be awarded to counsel for the plaintiffs shall be in accord with the provisions set forth in New Jersey Court Rule 1:21-7 governing contingent fee arrangements.

HERBERT J. STERN, U.S.D.J.

APPENDIX K

Order Denying Motion of Defendants for Judgment N.O.V. or in the Alternative, a New Trial

(Filed—April 8, 1980)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Hon. Herbert J. Stern)

Civil Action No. 77-1413

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation and THOMAS S. WEIR, an individual,

Defendants.

THIS MATTER having been opened to the Court by Crummy, Del Deo, Dolan & Purcell, attorneys for the defendants, Volkswagen of America, Inc. and Volkswagenwerk,

A.G., John T. Dolan appearing, and in the presence of Wallace, Chapas & Ober, attorneys for the plaintiffs, Barry Lynn Seese, Reinaldo Irizzary, Jr., Martin Ramos and Marcos Torres, Administrator of the Estate of Jose Torres, Deceased, Henry H. Wallace and Russell Ober appearing, on a Motion for Judgment N.O.V., or, in the alternative, a New Trial, pursuant to Federal Rule of Civil Procedure 50, and the Court having considered the moving papers, briefs and argument of counsel and for cause shown,

It Is on this 7 day of April, 1980;

Ordered:

That the Motion of the defendants, Volkwagen of America, Inc. and Volkswagenwerk, A.G., for Judgment N.O.V., or, in the alternative, a New Trial, be and is hereby denied.

Herbert J. Stern, U.S.D.J.

APPENDIX L

Notice of Appeal

(Filed—April, 8, 1980)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Hon. Herbert J. Stern)

Civil Action No. 77-1413

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS, and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

Plaintiffs,

v.

VOLKSWAGENWERK, A.G., a West German Corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation and THOMAS S. WEIR, an individual,

Defendants.

Notice is hereby given that Volkswagen of America, Inc., and Volkswagenwerk, A.G., defendants in the above-captioned matter, hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgment

Appendix L

of March 31, 1980, entered by the Honorable Herbert J. Stern, U.S.D.J.

CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway I
Newark, New Jersey 07102
Attorneys for Defendants
By: JOHN T. DOLAN

Dated: April 8, 1980

APPENDIX M

Transcript of Hearing on Motion for Summary Judgment October 9, 1979

(2)* The Court: Seese v. Volkswagen.
Mr. Wallace: Good morning, your Honor.
The Court: Good morning.
Mr. Dolan: Good morning, your Honor.
The Court: Good morning.

While it has never been clear to me exactly the difference between neglect on the one hand and so-called strict liability on the other, since both speak in terms of unreasonable dangerousness, even the Restatement speaks of a defective condition, unreasonably dangerous to the user, but then again it goes back in the remaining provisions to speak in terms of being no defense, that it was made as well as it could be. Whatever the differences may be, we will let the philospohers deal with them, for I am persuaded that North Carolina would not invoke strict liability.

If I sat on the Supreme Court of North Carolina, I would. If I sat on an inferior court of North Carolina, I would ask the Supreme Court to. For my purposes I cannot understand why the Supreme Court of North Carolina would not protect its citizens to the same extent that some forty-seven other states have chosen to do so.

Obviously, it would place almost no burden on manufacturers in North Carolina since they, unless they confine their goods and products solely to North Carolina, are being held to that standard just above everywhere else (3) strict liability would in fact protect the citizens and

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* Figures in parentheses refer to each new page of the stenographic transcript.

residents and passengers through North Carolina to the same extent that overwhelming majority of the other states protect their citizens, residents and sojourners.

In addition to that, I cannot substitute my judgment for that of the North Carolina courts, and I am presented with two opinions of the Court of Appeals of North Caroline which, while not exactly so, recognizes that is the law, I cannot create something different. I'm not going to—

Mr. Wallace: May I speak to the issue, your Honor?

The Court: Let me finish.

Mr. Wallace: Sure.

The Court: Likewise, there are cases directly on point. North Carolina still recognizes the privity doctrine. I had thought that was largely put to bed by Cardoza, but not in North Carolina, and that's North Carolina. I'm sitting in diversity. I have to apply North Carolina law.

However, the third aspect, I am persuaded that the Issac's case is the proper law, and I stand with the chief judge of that district, and I believe that North Carolina would use the enhanced damages' doctrine and would hold the manufacturer liable for any enhanced damages occasioned by a negligently-manufactured automobile which caused additional damages to the occupants of the automobile by reason (4) of that negligence.

In light of that ruling, I'm not even sure that anything you are about to say makes the slightest bit of difference. Perhaps it is a Pyrrhic victory that you have achieved. Nonetheless, without regard to who wins and who loses, I have done what I think North Carolina requires me to do.

Do you want to be heard still?

Mr. Wallace: Briefly, your Honor.

The Court: Of course.

Mr. Wallace: I would thank you for your ruling on the second point. I would only discuss the first point, not the privity point.

The reason for my standing up is that you mentioned that you were faced with two North Carolina, I believe, Court of Appeals cases holding that there would be no strict liability in North Carolina.

The Court: They don't seem to say that.

Mr. Wallace: That is not correct. I'd like to set the record straight on it.

We all know what the momentum is and how all the other states, virtually all the states in this country deal with strict liability.

I would call your attention first to the Fowler case, the lead case cited by the defendant Volkswagen.

(5) Your Honor, that case is a design defect case, and in order to make the understanding of strict liability clear, there are two types of defects; design defect and specific defect.

I would not quarrel with the Fowler case, nor would your Honor, but in a design defect case the question is was the design reasonable. That is how you prove the design is defective. It is not unreasonable. The engineering principles in design weren't reasonable. So Fowler, I submit, is not wrong.

The Court: That is what I don't understand. What is the difference whether you use strict liability or negligence. If it is not reasonable, it is not reasonable.

Mr. Wallace: Let me give you the difference. In the other type of case, which we call a specific defect case, the plaintiff doesn't say, for instance, the constant velocity joint in this case. This is only on for instance. For instance, the plaintiff does not say that there was any defect in the design of that constant velocity joint. The

plaintiff might stipulate it is as good a constant velocity joint as there is in the world, but the plaintiff says this is a rotten apple.

This one, no matter how many other ones, this one was a bad one.

Now, in a case such as this, the plaintiff is (6) in a very difficult position to get in and prove unreasonable conduct in the assembly or the manufacture of this constant velocity joint. This particular plaintiff can't go to Germany and watch them assemble them, but the law of strict liability looks to the product, not the manufacturer. I read you a quote—

The Court: You still make sure it is unreasonably defective?

Mr. Wallace: No.

The Court: That's what it says.

Mr. Walace: No, it does not, your Honor.

The Court: Doesn't? Ha.

Mr. Wallace: No, your Honor.

The Court: It says—the Restatement, you mean?

Mr. Wallace: May I proceed?

The Court: Yes.

Mr. Wallace: I will explain.

The word "unreasonably dangerous" is in there but let me go ahead further.

In looking at not the design of a product now, now saying they are all bad, but just the one, the rotten apple in the barrel.

The plaintiff then has the burden of proving that this product, this one, is defective. He looks only at the product, not at the conduct of the manufacturer. This (7) one is defective. It was defective when it left the manufacturer's plant at the time, and at the time it was sold; and that defect proximately caused the injury.

Then there are courts around the country that look at the words "unreasonably dangerous" in the Restatement, and some courts say if it is defective, it is by definition unreasonably dangerous. Other courts say if it is defective and it's the kind of defect like the nut that the lady bit on that wasn't shelled in one of these cases.

The Court: The first reading—

Mr. Wallace: The Coffer case—

The Court: The first reading you offered me would in effect read out the word "unreasonable" since the word "defective" is already used.

Mr. Wallace: Yes. Many states have said that California, Pennsylvania and, I believe, New Jersey, have read out the words "unreasonably dangerous." However, that doesn't need to be read out.

The question is, and the point we are going to is, must the plaintiff be forced to look at the conduct of the manufacturer when for most plaintiffs it is impossible and particularly in the Seese case your Honor ruled we couldn't go to Germany, if you remember, and look. It is totally impossible.

The Court: Wait a minute now. I ruled you (8) couldn't go because they weren't making the car any more.

Mr. Wallace: Your Honor, they are making the same constant velocity joint on the car today.

The Court: Mr.—

Mr. Wallace: Mr. Dolan set the record straight about that before.

The Court: Do you want to go to Germany? Do you want an adjournment?

Mr. Wallace: Yes. Let me finish my argument.

The Court: Go ahead.

Mr. Wallace: The Courts in their wisdom since 1975 —I would point out the second case cited by the other side

is a 1965, before adoption by the American Law Institute of the Restatement Section, 402(a), so it couldn't be. So there are no cases in North Carolina for the position that North Carolina wouldn't adopt 402(a) of the Restatement of Torts, strict liability.

Looking to the product, you look to the product and say, is the product defective? Is the product unreasonably dangerous, the one, the rotten apple in the barrel, and you focus your attention totally on it and not on the manufacturer.

Well, that position has swept the country. The question then becomes, how about North Carolina? Is North Carolina in the dark ages? So we look.

(9) The Court: May I ask you a question?

Mr. Wallace: There are only four cases cited.

The Court: Wait a minute. You look at it—what is the difference if you look at it under that view or you look at it as the one rotten apple in the barrel? If it was unreasonably dangerous, I take it they are within the meaning of the word "unreasonable." There is a weighing.

Mr. Wallace: Yes, your Honor, but you see—

The Court: That is to say—

Mr. Wallace: —in a strict—

The Court: That is to say, if that car was unreasonably dangerous, that means that implicit in that, to me, if not explicit, is it should not have been permitted out of the shop.

Mr. Wallace: No, your Honor. The defendant is—if we find, for instance, that the part, the widget, the apple, is unreasonably dangerous and defective, the defendants caused that defect, unreasonable danger, caused the injury, proximately caused, then the defendants lose in a products' liability case.

If you use the old negligence principles—

The Court: What does the word "unreasonable" mean in the Restatement?

Mr. Wallace: What does it mean?

The Court: That's what I asked you.

(10) Mr. Wallace: It means the type of defect which would be prone to cause serious injury.

The Court: Why isn't that the same as the negligence test?

Mr. Wallace: Because we are only looking to the product. If you apply negligence principles the defendant can walk in and say, there is the product, it's a rotten apple. It is unreasonably dangerous. It's a time bomb but we bought the best products we could. We assembled them in the best way we could, and we had quality control, and so on. And, therefore, our conduct, look to us, the defendant, our conduct under negligence principles, where it looks to our conduct, our conduct is above reproach. That is no defense in a strict liability defense.

The Court: It may be above reproach to you. It seems to me if you put out an unreasonably dangerous product, it matters not how you made it if the end result is unreasonably dangerous and you do not alert the consumer it is dangerous. You are it under any theory.

Mr. Wallace: Yes, your Honor, that's correct. You and I agree. But if you rule there is no strict liability in North Carolina, you cannot apply what you have just said.

The Court: Why isn't what I have just said, the same as the standard test of negligence; that is to say, if you give to a child something made very well but dangerous for (11) children, aren't you it?

Mr. Wallace: I believe you are, your Honor.

The Court: If you give to an adult something made very well within the limits of what one can make it, but

it is exceedingly dangerous and give that adult no warning, why aren't you under standard doctrines of—

Mr. Wallace: You are, I think, under both doctrines, under a negligence, failure-to-warn-philosophy. I want your Honor to zero in on the one particular type of case and the type of case we have in fifty percent of the plaintiffs' cases in the Seese case. That is the constant velocity joint, the one rotten apple in the barrel.

Now, I submit that under all four of the cases cited by them and me, the Coffer case, the Batiste case, Fowler case and even the Wilson case, there is no position that North Carolina does not adopt strict liability; to wit: look to the product, the conduct of the product, is the product unreasonably dangerous, instead of looking to the manufacturer. I'd like to just for a second take those cases apart, if I may.

The Court: I know there is no precise holding, but there is language which indicates that that is the North Carolina view.

Mr. Wallace: I submit there isn't.

The Court: I cannot be blind to the fact that a (12) state which takes the view it does in the area of lack of privity, with the lack in the cases that it has, even if they are not precise holdings.

Mr. Wallace: Your Honor—

The Court: I'd rather find your way.

Mr. Wallace: Please, there are some things in these cases, some language, which I think your Honor really must hear. I hate to, with so many people in the courtroom, take your time—

The Court: Then I'll hold you to last.

Mr. Wallace: All right. There is some language in these cases which are clear. Thank you.

The Court: You sup[illegible]ied briefs.

Mr. Wallace: Yes.

The Court: I've done the best I can. If you want to argue to me, I'll hold you.

Mr. Wallace: I'll leave something for oral argument. I have some things that are not in the briefs.

The Court: That is a great mistake in my view.

Mr. Wallace: I beg your pardon?

The Court: You wouldn't do that in the Court of Appeals. Indeed, I think there is something I once read that it is even unfair.

Mr. Wallace: No. It is not any new case, your Honor, but rather some quotations from some of the cases. (13) For instance, some of the crash worthiness cases the courts in talking say—in North Carolina hold if the product is defective, the plaintiff wins and has strict liability language in those other cases which are cited. Some of his cases and some of mine.

I'll be happy to be held for last. I'd like to argue this point as it is very important.

The Court: If you do not prevail on it, do you not wish to go to trial tomorrow; is that it?

Mr. Wallace: Frankly, I don't have a decision on that. I wanted to go to Germany and take a look so that if this particular problem as to having to look to the conduct of the manufacturer became an issue, rather than looking to the conduct of the product, I'd do it.

The Court: You can require them to appear and testify.

Mr. Wallace: That's another story involving a German defendant, your Honor. I can speak also as to that.

The Court: You mean I don't have the power to do that?

Mr. Wallace: I have been before federal courts who have ruled that they have the power and I have been be-

fore federal courts who have ruled they did not have the power.

The Court: So far as I'm concerned—

(14) Mr. Wallace: It gets into the Hague convention and many, many other things.

The Court: No, no. Not a question of the power over the individuals but the power over the corporation.

Mr. Wallace: That's the argument I always make, your Honor.

The Court: You win that one with me.

Mr. Wallace: Thank you.

Certainly, if I have to look to the conduct of Volkswagen in assemblying—then buy the constant velocity joint from somebody else. They design it. Our case isn't about the design but it is about the assembly. It is about the quality control of it.

The Court: Let me—

Mr. Wallace: The long and hard is I'd like to look at them doing it.

The Court: My rulings are what I indicated. But I will give you some additional time at the end of this morning.

Mr. Wallace: Thank you.

The Court: I put you on first because you said you needed to be first, both sides, because you were going to trial tomorrow. It's a very substantial case. I wanted to accommodate you. I have a responsibility to the other people. If I have additional time, I'll hear you at that (15) time.

Mr. Wallace: Thank you.

Mr. Dolan: If your Honor please, if I could address myself just for a moment, with the Court's permission, with regard to the appearance of the defendant here? The

defendant will be in court and will be able to answer any questions that Mr. Wallace will put to him.

The Court: I gather you'll produce any of your employees that are needed?

Mr. Dolan: Yes, sir. They have already been deposed, including the people who supplied the parts to Volkswagen.

The Court: I gather you'll also cooperate with the Court and produce witnesses who may have information relevant to anything before the Court?

Mr. Dolan: Sure. That is to the best of my ability. I can't—you know, they are there and I'm here.

The Court: You are the corporation in this court.

Mr. Dolan: All right, sir.

The Court: Thank you.

Mr. Dolan: Your Honor, in light of your—

The Court: Let me hold the rest of it and deal with the other people.

Mr. Dolan: May I suggest this, your Honor? We both do have, at least I do, have many things to take care (16) of before we get underway tomorrow.

In light of your decision to defer oral argument on some of these points, may I respectfully request we do that tomorrow morning just before we get underway?

If Mr. Wallace has no objection to that, I think that would make more sense.

The Court: All right. We'll take another look at these cases, again.

Mr. Dolan: Fine. Thank you, Judge.

The Court: I mean, my personal prediliction is to stand with the forty-seven states, including the standard—the protection to consumers because the manufacturers can insure against these things and they spread the cost of them. I think that's the bottom line of all of this. But I

sit up here far away. I can't remodel the law. I'll take another look at it.

Mr. Wallace: May I ask your Honor in taking a look at it to take a look at the Alexander case which is cited in the Crash-Worthiness Section at page 327 where it contains strict liability language. And also the Issacson where which is cited on crash-worthiness.

The Court: I have it. I read it. Right on the bench.

Mr. Wallace: Page 7, where it uses strict liability language.

(17) The Court: That is the case by the chief judge that I referred to. Larkins, Chief Judge.

Mr. Wallace: That is on the issue of crashworthiness but also, you see, the pages I just told you. There is some strict liability language in those, also.

If you try to get an indication what North Carolina would do and also take another look at Fowler, you will find that Fowler talks about design, and I have no question that strict liability design and negligent design are the same thing.

We are talking about a specific defect.

The Court. You don't allege here negligence in design.

Mr. Wallace: As to the constant velocity joint, we don't. We do as to the windows. That is the crash-worthiness case. As to the other, we don't.

The Court: It's a bad apple?

Mr. Wallace: Yes.

Mr. Dolan: I think that this morning was important to clarify it before we get underway.

The Court: Thank you very much, gentlemen. I'll see you tomorrow morning.

Mr. Dolan: Thank you.

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APPENDIX N

Excerpts from Transcript of Trial, October 10, 1979

(2)* Mr. Wallace: I'm not going to review what I said yesterday about the difference between 40)(a) that looks at the product—

The Court: I understand that now. I agree with you that in spite of the language of the Courts construe it to be an absolute liability.

Mr. Wallace: I took a couple of minutes last night just to outline the four cases, the only four that are relied upon by the defendants and the plaintiffs in the brief on this issue.

The first case pointed out by the defendants is the Fowler case. In 1979, North Carolina, Appellate Division case, involving a defective design of an icemaker, where there was a holding that 402(a) was inapplicable. This was a case involving the reasonableness of the design of the icemaker. The Fowler case cited the Wilson case, which is a 1963 North Carolina Supreme Court case.

(3) The Fowler case did not reject 402(a). It is a specific defect case. Says something that is very wise. I think it ought to be done all over the country. Judges ought to quit messing around with the 402 case where design isn't the issue. But this was a design defect case. I think the Judge was very wise in the Fowler case in his decision. He didn't talk about the rotten apple case, the case of the one specific defective product. He cited the Wilson case.

Take a look at the Wilson case. Wilson versus Lowe. It was decided in 1963, two years before the promulgation of 402(a) and strict liability. So it was never even reached or questioned in the Wilson case. It wasn't brought up because it hadn't been born yet.

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* Numerals in parentheses refer to each new page of the stenographic transcript.

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In the Wilson case, which is a case of a defective ladder, it was held that the products conduct—excuse me—the producers conduct is tested by the theories of negligence. It is very interesting to look at the cases that the North Carolina Court cited in Wilson. It cited a Minnesota case, a Maryland case and a Michigan case and a case —they didn't tell us the jurisdiction. I don't know what it was, but in the Third Circuit. Five—all five jurisdictions, including all of the Third Circuit jurisdictions, have now overruled their decisions which were cited in that case. They have adopted 402(a). That's what the defendant cites.

There is not a Supreme Court nor an Appellate Division (4) Court in North Carolina which rejects 402(a), but there are two Appellate decisions in North Carolina where the issue was broached. And they are the Coffer versus Standard case and the Bastiste versus American Home case. Coffer versus Standard was a 1976 North Carolina Appellate Division case and the issue was—

The Court: He bit down on an unshelled nut.

Mr. Wallace: Yes. The Court held there was no unreasonable danger of having an unshelled nut. And the Court went right to Section 402(a) and said: Look, there is no unreasonable danger in this unshelled nut," and went to (i) and (k) of Section 402(a) of the Restatement of Torts. Never rejected it. Applied it and applies the exceptions.

The Court: Arguendo.

Mr. Wallace: Arguendo.

The Court: "Assuming arguendo," it said.

Mr. Wallace: Yes, your Honor. There is no doubt about that.

The Court: Why would it say, "assuming arguendo," if it was the law in North Carolina?

Mr. Wallace: Because it didn't know. There is no doubt that North Carolina, I submit, your Honor, in a specific defect case, has never looked at Section 402(a) of the Restatement of Torts for strict liability.

In a situation where you have a State Court that (5) has never looked, then it becomes your duty to take a look at the national trends. And since 1971 nobody has rejected 402(a). You have an overwhelming majority. The last we looked was 43 jurisdictions had adopted and there were neutral jurisdictions. I believe there is 47.

The Court: 47 now?

Mr. Wallace: I didn't want to exaggerate.

The other case where Section 402(a) was broached to the Court in North Carolina was Bastiste versus American Homes in 1977 in the Appellate Division of the Courts of North Carolina. Here this was an action against a druggist for an oral contraceptive which caused a stroke, allegedly. The Court again held that the defendant was exempt under Section 402(a) of the Restatement of Torts, looking at Comment K. So, once again, the Court, arguendo or not arguendo, said: "Look, you, plaintiff, can't win under Section 402(b) because wel'll look at 402(a). Look at Comment I and Comment K. You have the wrong kind of case. We don't have any case in North Carolina, any, that says we reject Section 402(a) of the Restatement of Torts."

The Court: I think there may be an assumption we can make from that.

Mr. Wallace: Yes, your Honor.

(6) The Court: It may well be that no one has advanced such claims in the entire State of North Carolina because they understand under the existing state of the law they can't do it. It's pretty hard to believe that in a state—in

an entire state where millions of people dwell, which has lots of lawyers, that nobody is advancing such claims.

Mr. Wallace: Let me address that for just a moment. Being from Pennsylvania, as you are from New Jersey, I tend to think, as I'm sure Mr. Dolan thinks, along the lines you just said. But I've had occasion, for instance only two years ago, to try a 402(a) case in Virginia, in the Federal District Court. I ran into exactly the same thing. And the issues were raised. Virginia doesn't have crash worthiness and Virginia doesn't have Section 402(a) of the Restatement of Torts, and we look at the law, and lo and behold, in a state as industrial as Virginia there were no decisions.

The judge then had to take a look at the overwhelming trends in the majority of cases and ruled that 402(a) would apply in a Volkswagen case in a specific defect case.

So, I submit, your Honor, that under the circumstances there aren't any decisions that say it doesn't apply in North Carolina and there are two decisions (7) where the North Carolina appellate courts at least argue do—they disposed of the cases by applying—

The Court: No. We are no strangers, judges and lawyers, to courts which say assuming arguendo. They are just covering all the bases.

Mr. Wallace: We, I agree. So, they would have—

The Court: I don't know why they do it, because it isn't very helpful. It just makes sure their own decisions are not reviewable, maybe.

Mr. Wallace: I believe that's the reason.

The Court: It is not helpful, you know.

Mr. Wallace: Then we have a vacuum. If we have a vacuum, I submit, your Honor, your Honor is required to look elsewhere, at other jurisdictions, national trends and policy reasons.

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The Court: But only to judge what North Carolina would do, not what it should do.

Mr. Wallace: No, that's correct. But if you take a look at North Carolina, you take a look, for instance, at the Fowler case which he cited, and the judge deciding the Fowler case specifically said, "Look, this is a design defect case—a design defect case."

The Court: It says "North Carolina has not embraced the doctrine of strict liability in tort," close (8) quote, page 864.

(8) Mr. Wallace: That's right. But he goes on. He doesn't say North Carolina has rejected that, either.

The Court: They haven't embraced it, they haven't embraced it.

Mr. Wallace: He leaves it open. Then he goes on very carefully to be very critical of Section 402(a) for strict liability in a design defect case, which I submit I can't argue with at all.

The Court: The one case you got going for you is Alexander Seaboard.

Mr. Wallace: Yes, your Honor. That's the case cited by the defendants on the crash worthiness issue, which there is a beautiful quote in that.

The Court: Which did apply in a design situation.

Mr. Wallace: I believe that is dicta in the Allegheny Seaboard.

The Court: Alexander case.

Mr. Wallace: For the record, I'd like to put that in.

The Court: You don't have to come with a record of cases. You argue in the Court of Appeals all you want to from cases without putting it in the record. I'm speaking of the quotation at page 327 where—at the (9) bottom right-hand corner of the page where the Court specifically

uses the language. It states if there is a defect and the defect causes the injury, that the plaintiff wins.

The Court: I think that the rule should be the one you want. I think if I had to vote either at the polling booth or at the Legislature or on the Supreme Court of North Carolina, that's what I would vote for.

Mr. Wallace: I understand that, and I appreciate that. But the question then is North Carolina hasn't rejected it in a specific defect case.

The Court: You know, this is the worst moment for a federal judge in diversity.

Mr. Wallace: Also for a plaintiff's problem.

The Court: You picked the forum. You could have been in the state court in North Carolina.

Mr. Wallace: I could have been. There were strong reasons to be here, your Honor.

The Court: At least you could have had people with expertise who are more closely attuned than we are here to the developments of North Carolina law. Even the Federal Court in North Carolina would have been open to you.

Mr. Wallace: Your Honor, other problems—

The Court: I'm sure you had other reasons.

(10) Mr. Wallace: Other reasons.

The Court: But I'm sitting here. No matter what I do in this area, which may be of importance, it may not be, even, I don't know, which may be of importance to the case.

Mr. Wallace: I believe it sounds the death knell to about 50 percent of the plaintiff's case.

The Court: If you recover on any theory, your recovery is likely to be high.

Mr. Wallace: Yes, your Honor. If you have a chance to roll the dice twice looking for a settlement, and—I prefer it twice.

The Court: I would prefer a good roll once.

Mr. Wallace: I do, too.

The Court: My problem is I don't know the answer. I really don't know the answer.

Mr. Wallace: Maybe there is someone who does.

The Court: Who.

Mr. Wallace: I make a suggestion?

The Court: Do you want to certify it to the Supreme Court of North Carolina?

Mr. Wallace: I suggest your Honor at least make a phone call to Chief Judge Sharp of the Supreme Court, and ask the Judge.

The Court: Wouldn't that be a terrible thing (11) to do, completely non-judicial.

Mr. Wallace: I don't think so. I'd like to mention to you in the Huff case in Illinois, two of the judges in that case dissented in the footnote and suggested that that very thing that I'm asking you be done.

The Court: Federal judges?

Mr. Wallace: Yes, your Honor.

The Court: You mean I should simply place a call and say, "What do you think, Chief Justice"?

Mr. Wallace: Yes, your Honor. I'm faced with a very difficult—

The Court: She only has one vote on the Court.

Mr. Wallace: You'd ask her not what she likes, but rather what is the law now. Tell her the lawyer stands in front of you and says there is a vacuum. If she says it is wrong, I'll stop right there. In an issue this important—

The Court: She would probably say, "I'd like the benefit of briefs." Why would her court do what our court would undoubtedly refuse to do?

Mr. Wallace: I hate to speculate. Here we have, and we have to speculate. If there is—you look at the Wilson case, which Fowler relies on, you'll see that Wilson, every case cited in that case, has been overruled (12) by the juridictions in the wave of 402(a) going across the country. They are all overruled.

The Court: I tell you, this is maddening, frustrating.

Mr. Wallace: I'm sure to both of us, your Honor. But I have to pursue it.

The Court: I'm not asking you to stop. Whatever I do—I have to worry about fairness to both parties here. I have to worry about the integerity of the law. I feel sorry for the Circuit. I don't know how they would guess—

Mr. Wallace: All the jurisdictions in the Third Circuit have adopted that rule.

The Court: That is a matter of absolutely no significance to anybody who is not in the Third Circuit.

Mr. Wallace: Except when you have a vacuum situation with reference to the state law on the issue, then that's what you will do.

The Court: All right. Be seated for a minute, will you.

(Recess.)

(13) Mr. Wallace: I have one last thing to say. To sum up, just because the law is unclear in a state, to wit: North Carolina here, is no reason for your Honor to anticipate that they would reject strict liability in a specific defect case. I think the cases are clear if you don't know, you don't reject. You take a look at national trends, which is what I respectfully suggest should be done here.

Thank you.

Mr. Dolan: Your Honor, I think, your Honor, that truly in this situation there is no vacuum. The North Carolina Court has, as you know—and you indicated yesterday—has directly discussed this point and decided it.

The Court: What case directly decides it?

Mr. Dolan: In the Fowler case, sir, at Page 864 the Court said: "North Carolina"—this is a 1979 case.

"North Carolina has not embraced the doctrine of strict liability in tort."

In Wilson v. Hardware, Inc., 259 N.C. 660—

The Court: That was before the Restatement?

Mr. Dolan: Yes, sir. And this was adopted by this North Carolina Court in Fowler, without exception.

The Court: Wilson does not stand for rejection of the Restatement; right?

Mr. Dolan: That's correct.

(14) The Court: Therefore, the Batiste case—the Fowler versus General Electric case—

Mr. Dolan: Yes, sir.

The Court: —cannot use Wilson as a rejection of the Restatement, can it?

Mr. Dolan: No, sir.

The Court: I'm correct, am I not?

Mr. Dolan: That's correct. But Fowler indicates whether or not North Carolina has accepted strict liability. And it says—and this is in the quote—

The Court: Doesn't it say that the question has never been presented to the North Caroline Supreme Court?

Mr. Dolan: Yes, sir.

The Court: Is that correct?

Mr. Dolan That it was not.

The Court: That is was never presented?

Mr. Dolan: That's correct.

The Court: All that the Fowler case says is that 1963 was not accepted; right?

Mr. Dolan: No, sir. I don't believe so. North Carolina has not embraced the doctrine of strict liability in tort, period.

The Court: Referring to the Fowler case?

Mr. Dolan: Yes, sir.

The Court: The 1963 case?

(15) Mr. Dolan: No, sir. 1979 case. Fowler is 1979.

The Court: No. I mean referring to the Wilson case.

Mr. Dolan: It refers to Wilson. But the Fowler case is 1979.

The Court: But the authority for the proposition that North Carolina hasn't embraced is impressed on a 1963 decision; right?

Mr. Dolan: Uses that as authority. It points to that authority. But I don't believe—

The Court: They don't say it rejected it, either.

Mr. Dolan: It is totally consistent, sir, with every other case which has considered the issue and turned it down, including Coffer and Batiste. Both of these cases had the opportunity to examine 402 and accept it if they felt it was appropriate. And in both cases they turned it down.

Now, that's the law in North Carolina. All—there is not one case that has been pointed to by Mr. Wallace which has considered the adoption of strict liability of 402(a) that has adopted it. Therefore, the Courts, obviously, including Coffer and Batiste, have considered this very issue and decided not to accept it. As a matter of fact, your Honor has reference to the Alexander case. And you suggested that in some cases the reason the issue was not decided was because it wasn't raised because people understood what the law (16) was. That is exactly what happened in Alexander. In that case, which we cite on the basis of a crash worthy proposition, the plaintiff in that case raised the issue of strict liability and abandoned it before trial, probably for that very reason, because strict liability does not apply in North Carolina. That is exactly what you suggested. So I submit, sir, that the

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Courts in North Carolina have very directly considered the adoption or not adoption, the advisability of strict liability in 402(a) and they have declined to accept it and embrace it. And we have many cases which stand for authority for that proposition. Therefore, under Erie v. Tompkins—

The Court: You don't have to tell me about that. I know what my duty is there.

Mr. Dolan: Excuse me. This Court, I respectfully submit, sir, has the obligation to follow what I believe is clearly the position of the North Carolina Courts on this issue.

The Court: Off the record.

(Discussion off the record.)

(There is a pause in the proceedings.)

The Court: Yes, sir?

Mr. Dolan: The Courts don't make a difference between —a distinction between design and manufacturing defect. They say strict liability of any kind. They don't (17) make any distinction that that basis. If there is any case which says: "Okay, in a manufacturing case we will do it, but in a design case we will not," well, it hasn't been brought to your attention, sir, because I submit there is none in North Carolina. If there is one, I challenge Mr. Wallace to point to a manufacturing case where the Court said: "We will accept strict liability." And there is none that has been cited to your Honor.

Mr. Wallace: I would accept your challenge to this extent: You said that the North Carolina Courts do not make a distinction between a design defect and a specific defect. And I submit your own Fowler case, the beginning of the next paragraph after your quote about embracing the law or not embracing the law of strict liability, it begins—

Mr. Dolan: May I finish my argument, your Honor?

The Court: He challenged.

Mr. Wallace: I'd like to meet the challenge. One-sentence quote. "Nor have other jurisdictions embraced the strict liability against a manufacturer for defects in design."

The Court: You know, in the Coffer case the court said, assuming arguendo, it applied.

That case is to me, when a court does that, it is in fact touching all the bases, isn't it?

Mr. Dolan: Yes, sir.

The Court: It is kind of guaranteeing impregnability on review. Thus, in case the Supreme Court of North Carolina should say it did apply, well, they'll deal with it on the assumption that the Supreme Court of North Carolina might and make their finding there, too; isn't that so?

Mr. Dolan: Yes, sir.

The Court: Therefore, in the Court of Appeals' mind the issue was certainly open, wasn't it, or they wouldn't have gone and done that. They wouldn't have found any necessity to say assuming arguendo if strict liability applies you are still out of court.

For all they would have had to say, we don't consider that. That is not the law in North Carolina, right?

Mr. Dolan: I don't know if I would go that far with the proposition, sir. I think that case is significant to point out the fact that the Court did consider it and had the opportunity to embrace if it so chose.

The Court: No, no. It did embrace it. Once it said assuming arguendo strict liability applies and then went ahead to find no liability, even under that theory, it (19) in fact did apply it, didn't it? That is an application of it, isn't it?

Mr. Dolan: I don't believe so, no, sir.

The Court: Once you say assuming arguendo and apply the standards, that is in fact to apply it?

Mr. Dolan: To quote from the Coffer case, if I may, sir, if you will bear with me for a moment, your Honor, the Court directly if I may submit, sir, put in issue—did not accept the viability of a strict liability proposition in North Carolina but put it right in issue without deciding it.

The court said, assuming arguendo, as you have mentioned, the viability of strict liability in tort in North Carolina.

Therefore, I say, sir, that it is not at all clear that this Court by that language recognizes the viability.

The Court: What did it say after that language? Did it not in fact apply the standard of strict liability to the facts before it and decided there is no right to relief under that standard and those facts?

Mr. Dolan: Yes.

I order for strict liability to obtain, the product must not be defective, be unreasonably dangerous to health.

(20) The Court: That is in fact an application of the Restatement, isn't it?

Mr. Dolan: It did not apply it because of the fact that it noted additional that the ability of the proposition was in issue.

The Court: It is difficult to articulate on this. I don't mean to impose on your speaking.

When a court says: We don't know whether or not the doctrine of statute of wills applies, but under that doctrine you are out of court anyway, you are in effect applying it, aren't you?

Mr. Dolan: No. I don't accept that. I don't think that you are.

The Court: Because if in fact it doesn't apply you don't

even ask assuming arguendo. You just put it aside, don't you?

Mr. Dolan: I gather the Court addressed itself to it because it was an issue raised by the plaintiff. I don't think the Court volunteered.

The Court: Why should the Court, convinced, as you say I should be that the doctrine doesn't apply at all, deal with it at all except to say we don't care about this doctrine in North Carolina.

Mr. Dolan: I can't answer that.

The Court: It must have been alive in the Court's (21) mind at least as a possibility that the Supreme Court would in fact say you should have considered strict liability and in fact, as lawyers and judges, we know that when courts do that they are covering themselves against the potentiality of review; isn't that right?

Mr. Dolan: But it hasn't happened.

The Court: No, it hasn't happened yet.

Mr. Dolan: Right. That is what you are bound by, sir.

The Court: I am bound by the latest pronouncement of the Supreme Court of North Carolina, correct?

Mr. Dolan: That's correct.

The Court: That latest pronouncement was in 1963, correct?

Mr. Dolan: Yes.

The Court: The Restatement had not been written, correct?

Mr. Dolan: That's correct.

The Court: The Supreme Court of North Carolina has never addressed the Restatement, correct?

Mr. Dolan: I don't believe so, no, sir.

The Court: I am correct. Is that a question?

Mr. Dolan: I don't believe so. I'm not one hundred percent certain. I've done my best to research.

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The Court: You have found no cases since the (22) Restatement was promulgated which address the Restatement from North Carolina Supreme Court and rejects it; correct?

Mr. Nolan: I have found a case, namely, Fowler, which addresses the issue. Not the Supreme Court. Addresses the issue after the passage of 402(a).

The Court: I will ask you again—

Mr. Dolan: Yes, sir.

The Court: —you have found no case emanating from the Supreme Court of North Carolina since the promulgation of the Restatement which directly considers the Restatement; have you?

Mr. Dolan: I don't believe so. No, sir.

The Court: What?

Mr. Dolan: I don't believe I have. No, sir

The Court: If you had you would have told me, wouldn't you?

Mr. Dolan: Yes.

(23) The Court: We can't find any, either.

I tell you, I don't generally make decisions going one way and the other way. This is a most difficult situation.

Mr. Dolan: Your Honor, may I point out something? I submit, sir, that your obligation, absent an announcement on this issue with respect to North Carolina—you know, Judge, there are things about North Carolina law that I'm not entirely excited about either, but we are all stuck with it in this case. I'm not responsible for it. I know you know that. I just want to point that out, that we are all working with some impediments here because of the attitudes expressed by the state courts in the area of law.

The Court: Let me ask you a different question in a different area. Suppose I should ultimately disagree with

you. Is there any way to preserve the issue for appeal without totally having to try the case again? For example, could we do it on the basis of interrogatories or some way with the jury, in the event, if the verdict was against you, the jury would specify on what theories they found liability?

Mr.Dolan: I think it would be calling upon the jury to perform a very overwheming task, frankly, judging on various theories.

The Court: Why can't I have a special (24) interrogatory on each count? As a matter of fact, they have to return a verdict on each count separately.

Mr. Dolan: Yes.

The Court: Ye would have that without an interrogatory. Isn't that right?

Mr. Dolan: That is correct.

The Court: Damages would be no different no matter which theory of liability is used, isn't that correct?

Mr. Dolan: That is correct.

The Court: Therefore, if I rule against you and they return a verdict on those counts which are not implicated by this argument and not the ones which are, no harm is done.

Mr. Dolan: I don't agree, Judge.

The Court: How is harm done?

Mr. Dolan: But the evidence that will be going into this case—

The Court: But they will have rejected the evidence which they should not have received.

Mr. Dolan: I'm not satisfied we can ever make that determination. They are going to be hearing evidence that is going to be related to the strict liability issues which never would be in this case if we were dealing with a negligence case. I don't think we can ever carve (25) it

out after it has all gone in. I think that is the problem. That's why the decision has to be made now and not be preserved.

What I was about to say was that while you don't have have that Supreme Court case, you have at least, sir, and I think the cases hold that in this kind of a balancing effort you look to, absent a Supreme Court case, the next authority in the state in which we are dealing. That is the Court of Appeals in 1979 in North Carolina which specifically addresses this issue. I don't think that there is anything in Erie which prohibits this Court from looking to that case for some direction on an issue as sensitive as this.

As a matter of fact, I think that stands for the proposition that absent a Supreme Court case this is exactly what you do. And that is why I'm urging that we have a very recent North Carolina case on this very point.

The Court: That is the Fowler case.

Mr. Dolan: Yes. In Fowler they were asked to apply strict liability.

The Court: You concede they were.

Mr. Wallace: Yes, in a design defect case, I do. I so concede.

Mr. Dolan: We maintain there is no difference, design or manufacture. It's a strict liability case.

(26) The Court: Well,let me say this to you: Greater minds than I have grappled since Brandeis wrote Erie versus Tompkins and Smith versus Tyson was put aside in the words of the one who wrote the trial decision or had the trial court case in Erie versus Tompkins. I think it was a federal judge. Might have been in the Eastern District of New York; I'm not sure. He wrote in the margin of his book, "Good old Swifty, with regret and longing that it had been put aside." Professor Irving

Junger of the Cornell Law School said—I remember reading that.

One thing is clear, however, it may be that the court in North Carolina, the intermediary court in North Carolina, is not as free as I am under Eire. It may well be, since I am bound only by the decisions of the Supreme Court of North Carolina and have freedom to interpret what they would do if presented with a situation today, it may be that in terms of a 1963 opinion I am more free than the North Carolina inferor court would be.

Mr. Dolan: Might I address myself to that, sir? Excuse me.

The Court: Because it is one thing for a United States District Court to say that it is persuaded that the Supreme Court of North Carolina would not adhere to a ruling it made before the Restatement was extant. (27) In the face of 48 states, other states endorsing it, it may be one thing for this Court to say that; quite another thing for the Court immediately under the Supreme Court with the duty to follow its edicts and whose opinions are immediately subject to review. The Supreme Court of North Carolina will never review this case. It will never see this case.

If I were an intermediary appellate court in North Carolina, I could adhere with greater felicity to a decision by the Supreme Court which I might regard as out of date. I might think that they would regard it out of date at least secure in the knowledge if they want to, they can change the result in that very case.

(28) Here, however, because of the Federal system which neither of the parties can control nor create nor change one hair of it, none of the parties will ever get the benefit of the last word that could be said by the Supreme Court of North Carolina. In this situation there may be a

special duty on this Court to act with a little more freedom not to disobey the Supreme Court of North Carolina. But a little more freedom to interpret what the Supreme Court of North Carolina would do today, sixteen years later, than there may be on an intermediary Court in North Carolina whose judgments in North Carolina are immediately subject to review.

Mr. Dolan: Your Honor, I'm not certain I have this case with me. But I would point out to you, sir, that immediately after the Wilson case, quote: The Court also cites Gore v. George J. Ball, Inc., a North Carolina Appellate Division case, modified 279 North Carolina 192, a 1971 case, for the same proposition as the Wilson case. Obviously, well after the adoption of 402(a).

The Court: I asked you many times whether the Supreme Court of North Carolina has ever rejected this.

Mr. Dolan: Your Honor, I apologize. That has been just brought to my attention. I have to, of course, bring it to your attention.

The Court: You never cited that in your brief to me, did you?

(29) Mr. Dolan: Yes. It's in the Fowler case.

The Court: You didn't rely on any such precedent. Do we have the North Carolina reports?

The Clerk: We have the Southeast second.

Mr. Dolan: I may have it with me.

The Court: If you have a case from the North Carolina Supreme Court rejecting the Restatement after the Restatement was around to be rejected, that's the end of it. I don't think your adversary would say a word.

Do you disagree with that?

Mr. Wallace: No, I do not.

Your Honor, what we have there, that case stands for the proposition. It has nothing to do with that. It has

to do with the proposition once you have negligence, negligence must be the proximate cause of the injuries. That is my recollection. I didn't even copy the case.

The Court: Do you have it?

Mr. Dolan: I have the case here, sir.

The Court: You have the case?

Mr. Dolan: I have it with me, yes.

The Court: Does it address the Restatement?

Mr. Dolan: May I have a moment?

The Court: Yes.

Mr. Wallace: Your Honor—

The Court: Let him look.

(30) Mr. Wallace: You were quoting from Fowler.

Mr. Dolan: I can't read and listen at the same time.

The Court: In fairness, let him read the case.

Wait a minute. Be seated.

(There is a pause in the proceedings.)

The Court: I'll let you speak. He just can't do what he's doing and listen to you.

(There is a pause in the proceedings.)

The Court: This is really one of the most difficult jobs that a Federal Judge has to face, I find. I always find this to be.

Sorry to take all this time on this, but this is an important thing to both sides. I have a jury waiting. I can't help it. This motion was brought on very late in this lawsuit. I find it difficult to believe that you have a direct Supreme Court case and didn't cite it to me independently.

All right. Does it or does it not?

Mr. Dolan: I'm not able to find it, Judge. It's a rather lengthy opinion. I haven't been able to find it to this

point. I think that it is a negligence case, not a strict liability case.

The Court: Then it does not reject the Restatement?

(31) Mr. Dolan: I'm not able to find a rejection in it as I look through it now, sir.

The Court: Then you do not at this moment cite it as authority; correct?

Mr. Dolan: Correct.

The Court: All right.

Mr. Dolan: I would like the opportunity to review it.

The Court: I will tentatively rule—do you want to say something more? Go ahead.

Mr. Wallace: Yes.

The Court: You are burning to say something. Go ahead.

Mr. Wallace: We were quoting from—just very briefly, from the shell peanuts case, the Coffer case, your Honor. We were quoting where the Court said, "Assuming arguendo the strict liability." We went on after that. You asked Mr. Dolan to read after that. I submit we should look to the paragraph directly above, where it says, "Plaintiffs contend this appeal should be governed by the rule of strict liability in tort. While there appears some support for his position in our cases, we decline to adopt strict liability as a premise for the disposition of this case. Assuming arguendo"—and then they go on and apply it as they did.

That is in a Federal Court. So what they are (32) doing is they are saying, "Look, there is some support for the proposition in North Carolina cases. We're not going to apply it in the Coffer case."

The Court: That is not in the Federal Court.

Mr. Wallace: Yes.

The Court: The Court of Appeals, isn't it?

Mr. Wallace: Yes. That is your Court of Appeals, here.

The Court: Not a Federal case.

Mr. Wallace: The 1976 case.

(33) The Court: I think that language hurts you more than helps you, what you just read.

Mr. Wallace: The Court of Appeals said there is some support for the position of 402(a) in our states.

The Court: I've heard enough. I heard enough to be thoroughly uncertain. I'm going to sit here and pretend to be positive or clear on all of this, when I'm not, or to make believe.

This much I know: Most, if not all, modern legal scholars agree that the Restatement is good. Every Supreme Court, or every court of highest resort in every one of the states which has considered it, has accepted it. None have rejected it since its promulgation. Forty-seven states have accepted it, three have never considered it. In 47 states the citizens of those states—who are, incidentally, citizens of the United States, or may be—get the benefit of strict liability. In three they may or may not. We don't know, because the highest courts in those states have never specifically considered the Restatement. North Carolina appears to be one of these.

So much is not in dispute. To impose strict liability in North Carolina would not in any way, this Court must say, appear to contravene any of the interests of the State of North Carolina. To impose strict liability (34) in this case would not at all appear to disaccommodate any of the interests of anyone in North Carolina.

It is most difficult for this Court to believe, 16 years later, that the Supreme Court of North Carolina, constru-

ing the Restatement which was not before it 16 years earlier, faced with the fact that 47 sister states have already adopted it, considering the fact of the benefits that it would convey to the residents of North Carolina, would reject it.

Clear it is that the defendant is correct that there is a 1963 case which declines strict liability. There is also language in the intermediary appellate court of North Carolina which pays deference to that 1963 case and continues to pay deference to it after the passage of the Restatement. But no intermediary court in North Carolina could do anything else.

Until such time as the Supreme Court of North Carolina says differently, its 1963 precedent conclusively binds every inferior court in the State of North Carolina and no North Carolina court has the power to say different.

I think it would be rather unusual for a District Court in this Circuit, for example, to say that the Court of Appeals would change its mind if presented with the same issue today that it had decided 16 years earlier. (35) We would be most reluctant to do it because we would understand, first of all, that we are bound to apply the law as they say it is; and, second of all, that if they wished to change their mind, they may easily do so in the very controversy before us by the simple expedient of an appeal which would present the issue by these litigants to the Superior Court, thus presenting them with the chance in the very litigation to change their mind if indeed they wish to.

It would be rather presumptuous under such circumstances for the District Court to prophesy that because of a change in the mood, climate, Restatement, commentaries or otherwise, save perhaps by an actual change of law by Act of Congress, but saving that, or by the Supreme

Court of the United States—but saving those two instances—it would be rather bold for a District Court to prophesy that the Court of Appeals would simply change its mind because the needs of the times were perceived differently. And we wouldn't do it for the simple reason if they wanted to change their mind in respect to the law applicable to the case before us, they will have ample opportunity to do that when it reaches them.

But there is no opportunity so far as these litigants are concerned. It's a case in which the damages are alleged to be severe. Not that that would (36) really matter. For if it were a case involving just one penny over $10,000, exclusive of interest and costs, the litigants would be entitled to the same consideration.

I fundamentally believe if this issue were presented to the Supreme Court of North Carolina, they would decide this case differently than they did in 1963. I believe that based not on my personal belief that the Restatement is a better law, but based upon an objective evaluation of the fact that everybody believes it is a better law that has ever considered it in relationship to the law which was before it.

In other words, this District Judge does not prophesy that the Supreme Court of North Carolina would vote according to the way he would vote. He rather takes a look at what all the other states have done since 1963 when presented with the same issue, and finds that they are unanimous, without a dissent, and that of the three states which have not yet embraced the Restatement, of which North Carolina is a full one-third, they have not yet primarily because they have not yet considered it.

Such overwhelming endorsement by the highest courts of all of our states which Mr. Justice Frankfurter at some time referred to as laboratories in the testing of legal

notions, such an overwhelming endorsement cannot be lightly put aside, and forms a great empirical corroboration (37) of the claim made by the plaintiff that if the Supreme Court of North Carolina were ever permitted to pass on this issue, it would so hold in this case.

(38) The sense I get, dealing with the intermediary opinions—rather, the opinions of the intermediary Appellate Court in North Carolina is that there is a feeling there, too, of concern, as far as the continued viability of the Wilson 1963 precedent.

Mr. Dolan: Your Honor—

The Court: Courts which are—

Mr. Dolan: Excuse me.

The Court: —that a legal issue that need not be considered is not usually considered.

You wanted to say something?

Mr. Dolan: One word, if I may. I'm not trying to interrupt you, sir. And I don't know how—you haven't really told us how you are—

The Court: I think I have already. You are just waiting for the final.

Mr. Dolan: If this Court here in New Jersey, the District Court, your Honor, should decide this issue indicating that there is strict liability to be applied in this case, I submit, sir, that if a trial Judge in the State Court in North Carolina was placed in the same position he would be bound that there was no strict liability at the trial level.

The Court: He is bound by intermediary opinions, isn't he?

(39) Mr. Dolan: Yes, sir.

The Court: I am no, am I?

Mr. Dolan: I submit that he's bound by Wilson until that Supreme Court in North Carolina changes the law.

He is bound by it and strict liability would not be in the trial Court in North Carolina.

The Court: Take it step by step. He is bound by the opinions of the intermediary Appellate Court, isn't he?

Mr. Dolan: Yes, sir.

The Court: Am I?

Mr. Dolan: I submit that you are in the sense that you are to look to those Courts as the only announcement on the issue which should give you guidance under Erie?

The Court: Am I strictly bound?

Mr. Dolan: I think you are. Yes, sir.

The Court: Suppose there was no precedent?

Mr. Dolan: I think you are under Erie.

The Court: Let me just be precise with you.

Mr. Dolan: Yes, sir.

The Court: Assume the Wilson case were not decided. Assume that the intermediary Appellate Court of North Carolina said, "We reject the Restatement." Would I be bound by that opinion?

Mr. Dolan: This Court in New Jersey?

The Court: In any Federal Court in the United (40) States?

Mr. Dolan: Yes.

The Court: I don't believe that's right.

Mr. Dolan: That's our view of the law on that subject.

The Court: Could I be bound by such a decision from the trial court, such as the Superior Court of New Jersey, Court of Common Pleas of Pennsylvania, Supreme Court of New York?

Mr. Dolan: In the state in which we are looking to the law, I would say that you are; yes, sir.

The Court: Would I be bound by such a decision from a District Court?

Mr. Dolan: That's our third point in this brief on the crash worthy test.

The Court: Not Federal District—

Mr. Dolan: I'm sorry.

The Court: I mean County Court. A court of limited jurisdiction?

Mr. Dolan: I would say yes.

The Court: I think you are wrong on all of those counts.

Mr. Dolan: I understand.

The Court: I believe that the law under Erie is that I am bound by the Supreme Court and only the Supreme (41) Court and that I am not bound to follow every trial court decision and every intermediary Appellate decision as a matter of binding precedent, although you are correct at least to the extent that I should look to them for guidance so far as they can shed light on my assessment of what the Supreme Court of North Carolina would say if presented by that issue today. Applying that test, and that is the test I am applying, I must find that the Supreme Court of North Carolina has never considered the Restatement. It has never been presented to the Supreme Court, or so the parties have told me.

Mr. Dolan: Your Honor, you pointed out earlier—

The Court: If, for example, we had an opinion from the Supreme Court of North Carolina in 1880 on the point and nothing thereafter, I do not think I am required under Erie to totally disregard the entire climate of 100 years of law.

Mr. Dolan: Your Honor, Mr. Wallace was in the trial court, in the State Court in Georgia—excuse me—North Carolina, as you indicate. Mr. Wallace would be bound by the Appellate Court. No strict liability. Mr. Wallace, I assume, recognized that difficulty. That's why he's not

in the State Court in North Carolina. That's why he's here in New Jersey. He came here to avoid that problem.

The Court: I don't think that is a proper argument (42) because you are putting in—now I'll have to ask him why he came here.

Mr. Dolan: It's a forum shopping situation, sir. The law in North Carolina clearly, in my view, does not permit strict liability application in the trial level.

The Court: How would he know how I rule, because I have already twice, yesterday and this morning, already indicated I was going against him. If he is here rather than in North Carolina, he has very little possibility of reversal, because unless he can persuade the Third Circuit that I am wrong, he loses the ability of persuading the Supreme Court of North Carolina that the decision in 1963 is no longer viable review of the Restatement.

There are attendant advantages and disadvantages.

Mr. Dolan: I recognize that, sir.

The Court: Really?

Mr. Dolan: Yes, sir.

The Court: I think that you are wrong. I will recheck it. But I think that the law is that I am not bound. I mean, bound as a precedental matter by decisions of trial courts and intermediary courts of the State. I think there is a reason for that.

Mr. Dolan: May I point out in the plaintiff's brief, Page 3, they say, quote: "Since a lower State Court is an organ of the State, its determination in the absence of (43) more convincing evidence of what the State law is must be followed by a Federal Court in deciding the question governed by State law." And they cite West v. American Telephone & Telegraph. This is the Supreme Court of the United States, 311 U.S. 323, 1940 case. That is the plaintiffs' brief on that very issue.

(44) The Court: Well, of course, if I were conclusively bound, I would not be under duty to disregard it no matter what other convincing evidence there were.

It is only because I am not completely bound in jurisprudential sense that I can look at other evidence. If that other evidence persuades me that a higher court in the state, whose law I am construing, would deal with it differently, then I am not bound. Binding in that sense is a different sense, don't you see?

No matter what convincing evidence I might be given that the Third Circuit was wrong or that the Third Circuit would be overruled by the Supreme Court of the United States, I must follow the Third Circuit, isn't that right?

Mr. Dolan: Yes, sir.

The Court: That is not the situation with the intermediary Court of Appeals in North Carolina, is it? Because if I'm allowed to look to other evidence and consider other things, that is not the same kind of being bound, is it?

Mr. Dolan: That's what it is cited for by the plaintiff. I accept it.

The Court: I think whatever the plaintiff may say the law is my understanding has always been—I'll recheck it.

As I pick the jury, I'll have my law clerk get (45) some books out for me. No matter what he says the law is doesn't make it the law.

Mr. Dolan: That's correct, sir.

The Court: My duty is to find the law as it is or as best I may and to use the standards which I believe are right.

I've always understood it, I'm only conclusively bound in a juridical sense by laws—by cases which come out of

the highest court of the state, and if I can say, while paying deference to any inferior court, naturally, that I have reason to believe that a Superior Court within that jurisdiction would rule differently, I am not bound any longer.

Mr. Dolan: I understand your position, Judge. I submit, I think that it is erroneous, but I understand your analysis.

Mr. Wallace: I agree with your analysis, your Honor, and I would also point out that were you to look at the intermediate courts in North Carolina you will find, if you were bound by them, which you are not, but if you were to look at the Fowler case, that is a different issue.

The Court: We are going to pick a jury now. I'll get these people out. I'll pick a jury.

Before opening, I'll again indicate, although right now I tend to—I believe the Supreme Court of (46) North Carolina would do differently. The only question that I'm going to research right now is whether, having articulated the reasons for that belief, whether you are correct that I am conclusively bound by an intermediary Court of Appeals' decision which I believe would not stand once the Supreme Court of North Carolina took a look at it.

Mr. Dolan: Your Honor, may I address myself to another issue, please?

Mr. Wallace has raised substantial argument with respect to the second point on strict liability. Obviously, he hasn't argued with respect to crash worthiness because you have indicated, I hope primarily, that you have ruled in his favor.

I would respectfully request, sir, the opportunity to address that issue.

The Court: You are talking about enhanced damages?

Mr. Dolan: Yes, sir, I am.

Appendix N

It has vast implications in this litigation of a very important nature. I would respectfully request that I be given an opportunity to orally present argument on that issue to the Court.

It is equally as important to this defendant as is the issue of strict liability, and I submit that I'm sure it is to the Court as well.

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(163) The Court: I don't think the lower court in Simpson gave any consideration or discussion to crash worthiness.

Mr. Dolan: Yes, sir, it did. It went into Bulliner. It went into Alexander. It went into Larsen. It went into Evans.

The Court: I thought Simpson was whether the manufacturer had the duty to warn. Once the Court in Simpson determined it did not, that's all it did.

Mr. Dolan: No, sir. That is not my understanding of the opinion.

The Court: You may be right. I tell you, it is like sitting with a bunch of merlins.

(164) Mr. Dolan: I know:

The Court: Everybody with a different crystal ball depending on who the client is. You are rubbing away and trying to figure out what somebody is going to do.

Mr. Dolan: It gets worse, Judge.

The Court: I'm sure it will.

Mr. Dolan: Let me tell you why. Because if you follow this theory of crash worthiness in this case based upon North Carolina law, then what theory of crash worthiness are we going to be talking about? Because there has been no North Carolina decision, admittedly, which has addressed the issue. You don't know whether you are

going to follow New Jersey. Don't know whether you will follow Connecticut, California, Michigan, Illinois or Texas. You don't know. You have no guidelines. They differ—

The Court: Maybe I should transfer this case to the Northern District of—

Mr. Dolan: There is another problem. I hate to keep raising problems. If you say there is a crash worthiness element here, that there is a cause of action here based upon crash worthiness in this case, then we have to go a step further. We have to consider what kind of defenses are available in connection with it. I have in mind one which is a very definite defense in this case. That is the seat belt defense. Whether or not that is (165) available in a crash worthiness case within the meaning of that term as defined by someone—frankly, I don't know who.

So that, your Honor, I think you have to think about these problems when you decide whether or not there is a viable cause of action based on crash worthiness in this case. It doesn't stop there. You have to go beyond that. You have to consider what is the meaning of crash worthiness.

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Appendix N

Excerpts from Transcript of Trial, October 29, 1979

[*Witness: Robert Brenner—Redirect*]

(2444) Q. Did Volkswagen make a submission to the Conference on Experimental Safety Vehicles? A. Yes, it did. This was the International—this was the fourth, I believe, of a series of international conferences on the experimental safety vehicle. I presided at the first, which was held in Paris. This particular one was held in Kyoto, March of 1973. Volkswagen presented the official position with regard to its experimental safety vehicle development. Other participating nations under these multiple agreements or treaties presented their information.

Q. I take it Volkswagen in their presentation had a portion of it relating to the percentage of safety belt usage, is that correct? A. In that report—

Q. Wait. Was that particular portion of the report limited to safety belt usage in experimental vehicles or in vehicles in general, production vehicles? (2445) A. It pertained to all vehicles. It was the Volkswagen statement as to what the level of usage of safety belts was.

Q. All right. Is that statement by Volkswagen contained in a printed, bound volume from that conference? A. Yes, it is.

Q. Do you have it here with you today? A. I do.

Q. May I see it? A. May I step down to get it, your Honor?

The Court: Yes, you can.

(The witness leaves the chair, retrieves a book and returns.)

(2446) Q. The next question would be what is that percentage?

Mr. Dolan: If your Honor please, I don't think the foundation has been completely laid for this area. We don't know whether or not he's talking about worldwide or in the United States. I think it is important that be developed with the witness before he is allowed—

Mr. Wallace: May I reply to that, your Honor? What I'm going for is not what Mr. Dolan has said, but, rather, what was in the mind of Volkwagen's designers as to usage. This is exactly what this is submitted to.

The Court: Are the Volkswagen windows designed differently for cars sold in Europe than cars sold in the United States, or is it the same window design for the same vehicle? That is to say—well, I don't have to say any more. Do you understand?

The Witness: I undertand the question. May I—I would answer it this way, your Honor: Volkswagen cannot sell a vehicle in the United States that doesn't meet United States standards.

Now, whether or not they—

The Court: No. What I'm trying to ask is this: The Type 2 van; is that what we are talking about here?

The Witness: Yes, sir.

The Court: The multi-purpose van?

(2447) The Witness: Yes.

The Court: Are there different models put out for Europe than for the United States?

The Witness: To the best of my knowledge, no.

The Court: Objection overruled. Proceed.

By Mr. Wallace:

Q. What is—

The Court: Wait.

Mr. Dolan: May I inquire on that, sir, of the witness?

The Court: Yes.

Voir Dire Examination by Mr. Dolan:

Q. Where did you get that knowledge, Dr. Brenner? A. What knowledge?

Q. That the vehicles sold in Europe are the same—so far as windows are the same as in the United States? A. To the best of my knowledge, I said. I have no evidence they are different.

Q. Do you have any basis that they are the same?

Mr. Wallace: I submit this is far afield of the question of seat belt usage in the minds of the Volkswagen designers.

The Court. Not far afield. You see, as I understand it, gentlemen, the only issue of seat belts in this case is whether or not in designing the window the window designer could properly construe that the occupants of the cars would wear seat belts and design a window accordingly, or whether the more reasonable assumption would be they would not wear seat belts and so design a window accordingly. Thus—and for that reason and only that reason and only that reason is it possible that the statistics concerning what Volkswagen knew concerning the seat belt usage would be material to the case. So far, I think there is no disagreement.

Mr. Wallace: No disagreement.

The Court: All right.

Mr. Dolan: I understand your Honor's ruling.

The Court: Yes. The next question is whether or not the statistics includes worldwide usage is relevant. Is it a worldwide figure or is it broken down by country?

The Witness: The report pertains to U.S.A.

The Court: Well, then it is all academic, gentlemen. It's all academic.

You mean in their own report they refer only to the U.S.A.?

The Witness: I can read the statement.

The Court: Just answer me.

The Witness: Yes.

The Court: Objection is, I guess, not even there.

Mr. Dolan: It is not there. It was my understanding (2449) he was talking worldwide.

The Court: Well, you see—let's go.

By Mr. Wallace:

Q. What is that percentage? A. Ten percent.

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Appendix N

Excerpts from Transcript of Trial, November 12, 1979

(3796) The Court: Do you want me to ask them whether they saw anything?

Mr. Dolan: Here is my thought, Judge. It is in our view a tremendously prejudicial segment. I had no idea. I never saw it until that evening, and it was very alarming to me. Particularly in view of the fact that Mr. Bloch is prominent in the excerpt, itself, which lasted for about 20 minutes. Now, what I would—

The Court: Frankly, I think that is an ameliorating factor to you.

Mr. Dolan: What I would like to do—

The Court: The reason that I say that is because no matter what that program was, this jury has had an opportunity to see the architect of that program in this courtroom under cross-examination. And, frankly, if they believe that man, you're in a lot of trouble, no matter what he said on TV. If they believe what he said in this room after you finished with him, you got plenty of problems.

On the other hand, if you have successfully shaken his credibility here, nothing he says to them via (3797) the tube is going to matter. But, all right, go ahead.

Mr. Dolan: Of course, there were many other things.

The Court: I don't know. I don't know what is on there.

Mr. Dolan: I have a transcript which I don't vouch for the accuracy of. I took it down, myself, with a dictating piece of equipment. Then I had my secretary type it up, so we do have some of the language that was used during the course of the show. At this point I'm not going to offer that as a court exhibit, but—

The Court: Do you want me to ask these people if they have been exposed to anything?

Mr. Dolan: I think, your Honor, they are going to have to be put under oath individually out of the presence of each other and they're going to have to be voir dired, individually. I don't think this matter can be handled any other way. It is a very inflammatory, prejudicial show.

The Court: I will certainly—

Mr. Dolan: I request that.

The Court: I will certainly voir dire each one separately if anyone indicates they have been exposed to anything. But I have no intention of voir direing each one in the face of a denial.

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(3807) The Court: Ladies and gentlemen, • • •

• • •

(3808) Now, one other matter before we resume the trial. As you know, we have been alerting you for some time that there was going to be played on ABC or Channel 7 a certain presentation about automobiles.

Now, I must make an inquiry of each one of you as to whether or not any of you has been exposed to any of the publicity concerning that performance either before, during or afterwards, or whether anybody has said anything to you about the program that was aired on Channel 7 last Thursday. I'm going to do that in what is called a voir dire. You have seen witnesses voir dired. You are now going to be voir dired by me. I'm going to place you under oath the same way every other witness has been placed under oath. You are not witnesses, obvious; you are judges of the facts. It's best that I do it under oath.

Now, right after that I've got this Grand Jury thing, but I'm going to let you stay for that. You'll enjoy it. I'll get rid of that right away and we'll be back at trial.

Appendix N

Pass out the Bibles, please. Ladies and gentlemen, will you kindly rise as you did when you were first empanelled as the jury.

(Jury rises.)

The Court: After I—do each of you do solemnly swear that the answers you are about to make (3809) to me will be the truth, the whole truth and nothing but the truth, so help you God?

(All jurors answer in he affirmative.)

The Court: Please be seated.

Juror No. 1, have you heard anything at all about that program, its content or anything else about it before, during or after?

Juror No. 1: No, I haven't.

The Court: Juror No. 2, have you?

Juror No. 2: I did, your Honor. I was—

The Court: No. That's all, please. Just answer yes or no.

Juror No. 2: Yes.

The Court: Thank you. Juror No. 3?

Juror No. 3: The next day, yes.

The Court: Juror No. 4?

Juror No. 4: No.

The Court: Juror No. 5?

Juror No. 5. Nothing.

Juror No. 6: Nothing.

Alternate Juror No. 1: Yes.

Alternate Juror No. 2: No, your Honor.

Alternate Juror No. 3: No.

Alternate Juror No. 4: Yes.

The Court: All right. So I've got 2, 3, 7—I can't count so much—and 11. I guess we'll do it (3810) at sidebar.

Mr. Dolan: All right.

The Court: Any objection to doing it at sidebar? Ma'am would you come to sidebar for a moment. Now you'll see what happens at this magical place somewhere.

Juror No. 6: I heard, too. I heard the name.

The Court: Okay. Thank you. We'll have you over, too. Everybody wants to come over now.

(The following occurs at sidebar between the Court, counsel and Juror No. 2.)

The Court: I'm doing this at sidebar so whatever you may have heard no one else will hear. So let's try to keep our voices at about the level that I'm speaking.

Juror No. 2: All right.

The Court: What, if anything, did you hear?

Juror No. 2: At work, Friday, I went to work Friday and I was at the lunch table and talk come up about this program and they said it was on a Volkswagen accident. I just got right up and left.

The Court: Did you hear anything?

Juror No. 2: Nothing else, your Honor.

The Court: Has that in any way affected you as a juror in this case?

Juror No. 2: No way, no.

(3811) The Court: Any questions you would like asked?

Mr. Wallace: No, your Honor.

The Court: Any question you would like asked?

Mr. Dolan: Ma'am, did they tell you anything about what the show was about?

Juror No. 2: No. They were going to discuss it, but I got up. I said, "I can't listen to this," left, took my plate, went to another table.

Mr. Dolan: You got into no discussion in detail about this show at all?

Juror No. 2: No.

Mr. Dolan: Did they know you were involved in a trial involving Volkswagen?

Juror No. 2: They knew I was on jury duty. But, no, because I don't discuss it.

Mr. Dolan: That's the extent of what you've heard about the show?

Juror No. 2: No.

Mr. Dolan: That's all you have heard?

Juror No. 2: That's all.

Mr. Dolan: I have no further questions.

The Court: All right, ma'am. Please step back to the jury box.

(3812) From this point on I'll do the questioning of the jurors. I meant, did you want me to put any more questions? After all, you know, you don't want them to say they don't understand your questions. They'll be in the same position as the witnesses.

(End of sidebar.)

The Court: Juror No. 3, would you kindly come over.

(The following occurs at sidebar between the Court, counsel and Juror No. 3.)

The Court: The reason I'm doing this out of the presence of your fellow jurors is because I don't want anything that you may have heard to get over to them. So let's speak in about the same tone of voice that I'm speaking now, all right?

Juror No. 3: Um-hum.

The Court: When did you hear anything about this case?

Juror No. 3: Friday.

The Court: Friday. It was the day after?

Juror No. 3: (Nodding head in the affirmative.)

(3813) The Court: What was said to you?

Juror No. 3: I was asked if I had heard anything about it or seen it on television. I said no, and I didn't care to hear about it. Something about a Beetle. I said I didn't care to hear about it.

The Court: Was there any discussion about what was on the TV program?

Juror No. 3: No.

The Court: Have you formed any opinion as to what was on the TV program?

Juror No. 3: I don't really know what was on it so I couldn't form an opinion.

The Court: Whatever was said to you, would that in any way influence you in this case?

Juror No. 3: No.

The Court: Any question you want me to put to her?

Mr. Wallace: No, your Honor.

Mr. Dolan: I just wanted to know what were the circumstances, who mentioned it to her.

Juror No. 3: I've been at work all the time and they know I'm on jury duty.

Mr. Dolan: Just happened at work?

Juror No. 3: They know it's a Volkswagen case, and they asked me if I had seen television the night (3814) before.

The Court: That was the whole thing?

Juror No. 3: Yes.

The Court: Thank you, madam. Resume your seat, please.

(The following occurs in open court.)

The Court: Juror No. 6, I think you indicated you saw something or heard something.

(The following occurs at sidebar.)

Juror No. 6: It really wasn't anything. I didn't see the program. I didn't hear about the program. Only this morning it was said my husband told one of the witnesses that Mr. Bloch was on the program and that was—whether it was of any importance.

The Court: Which juror said that to you?

Juror No. 6: Do I have to?

The Court: Now that you said that, you have to.

Juror No. 6: 1.

The Court: Juror No. 1 said that?

Juror No. 6: Her husband said that Mr. Bloch—I don't know what it was. I have no idea what the program wasn't about. I wasn't that much interested. My husband was out and working. I don't know what that was about. She didn't mention that Mr. Bloch was on it, Byron Bloch.

(3815) The Court: Did she discuss with you anything?

Juror No. 6: I didn't hear anything else. Nothing else to me, truthfully.

The Court: Have you heard anything about this from any other source?

Juror No. 6: About?

The Court: About this program.

Juror No. 6: No, not really. That was the conversation in there. It was kidding, that you have to tell the Judge, and she said no. We were just talking. I never expected this to happen this morning. I really don't know what was on the program. That's the only thing.

The Court: Did she hear about it from anybody else?

Juror No. 6: She said her husband.

The Court: No. Have you heard about it?

Juror No. 6: No, no.

The Court: Any questions?

Mr. Wallace: Were you told anything about what Mr. Bloch said on television?

Juror No. 6: No. She didn't say anything. To be honest with you, I don't know.

Mr. Wallace: No questions.

Juror No. 6: They said one of the witnesses were on it. I had no idea what the program was about. You (3816) had said not to look at it. I was home working, but never even looked at the television.

The Court: Any questions?

Mr. Dolan: No, sir.

The Court: All right. Go on back.

Juror No. 6: I just feel bad.

Mr. Wallace: Don't.

The Court: Look, I'm telling you, I don't want you addressing the jurors. I don't want you consoling them. I don't want you attacking them. Leave them alone, both of you. I'll do the questioning.

Mr. Wallace: Yes, sir.

The Court: I got to get Juror No. 1 over here. I'm afraid I'll be giving up Juror No. 6.

Why don't you go through the other two, then I'll come back to Juror No. 1. Is that all right?

Mr. Dolan: Fine.

(End of sidebar discussion.)

(3817) The Court: Juror No. 7, sir.

(The following occurs at sidebar:)

The Court: What, if anything, did you see or hear in reference to that program?

Juror No. 7: The only thing, the initial request you gave me—gave us not to review it, I instructed the family not to, and they didn't. But someone spoke to me about

it later and I just told them I didn't want to know anything about it. That is as far as it went.

The Court: What did that individual say to you?

Juror No. 7: "Did you see the special on the Volkswagen?"

I said, "No. I was instructed not to see it.

The Court: Did they say anything to you about what was on the program?

Juror No. 7: No. They didn't go into details. I told them I didn't want to hear it.

The Court: Well, even in general, did they tell you anything at all about the subject matter of the program?

Juror No. 7: No. They said they had this special, you know. They didn't go into specifics. But just, you know, I told them I didn't want to hear it.

The Court: Tell me, whatever anybody said to you, would it at all influence you as a judge of the facts of this case?

(3818) Juror No. 7: No.

The Court: Any questions you want me to put to this juror?

Mr. Wallace: No.

The Court: Any questions you want me to put to this juror?

Mr. Dolan: May I ask when that conversation took place, your Honor?

The Court: When did this person speak to you?

Juror No. 7: I think—let me see. It was Friday.

The Court: Friday?

Juror No. 7. Yeah.

The Court: Anything else?

Mr. Dolan: The conversation did not identify anything that took place on the show, itself?

The Court: That's my understanding. In other words, he didn't say what he saw about Volkswagen. Just that he—

Juror No. 7: I told this fellow that I didn't want to hear it.

The Court: So you didn't hear anything?

Juror No. 7: No. I didn't as far as what—

The Court: Will you kindly resume your seat, sir? Thank you.

(3819) (End of sidebar conference.)

The Court: Yes, Ma'am. Thank you.

(Alternate Juror No. 4 approaches sidebar.)

(The following occurs at sidebar:)

Alternate Juror No. 4: I didn't hear much, but I was at the hairdresser's and one of the—somebody said, "Did you see the program the other night about the Volkswagen on 20/20?" I heard her say that it was something wrong—it was the Beetle, and there was something wrong with the seats.

The Court: Please keep your voice down.

Alternate Juror No. 4: Oh.

The Court: I don't want your fellow jurors to hear us.

Alternate Juror No. 4: There was something wrong with the seats and the Volkswagen people refused to fix them, to do anything about it.

The Court: Did you repeat any of that to any of the other jurors?

Alternate Juror No. 4: No, no.

The Court: Let me ask you this: Would that in any

way influence you if you were selected as a juror in this case?

Alternate Juror No. 4: No. I don't think so.

The Court: Why not?

(3820) Alternate Juror No. 4: Why not? Well, it has nothing to do with this case. I didn't hear anything about windows or anything else.

The Court: This case isn't a Beetle case, is it?

Alternate Juror No. 4: Hum?

The Court: This case is not a Beetle case, is it? That's right?

Alternate Juror No. 4: That's right. It has nothing to do with the seats. It wouldn't influence me anyway.

The Court: Any questions you want me to ask her?

Mr. Wallace: No.

The Court: Any questions you want me to ask her?

Mr. Dolan: Judge, I would like you to ask whether or not the fact that this lady was told that Volkswagen wouldn't do anything about it, whether or not that would affect her in this case.

The Court: He wants to know whether or not because somebody said on television they wouldn't do anything about the seats, would that in any way influence you if you sat in this case?

Alternate Juror No. 4: Well, I hope not. I don't think so.

The Court: Why wouldn't it? You tell us why you wouldn't consider that. First of all—

Alternate Juror No. 4: I might not have gotten (3821) the story straight. This was just something I overheard.

The Court: First of all, you didn't even see it yourself, did you?

Alternate Juror No. 4: No.

The Court: Second of all, do you believe everything they say on television?

Alternate Juror No. 4: No. Mostly.

The Court: I'm satisfied that this—would you do something for me? Will you not repeat anything you may have heard—

Alternate Juror No. 4: No. I won't.

The Court: —to the other jurors?

Alternate Juror No. 4: No. Absolutely not.

The Court: All right. Anything else you want me to ask her?

Mr. Dolan: No, sir.

The Court: All right. Take your seat, please.

(Alternate Juror No. 4 leaves sidebar and resumes her seat in the jury box.)

(3822) The Court: That's an honest woman, and a smart woman, and she immediately saw the difference between even what she heard and what is on trial before her.

Mr. Dolan: Judge, she also hesitated when you asked her whether or not whether Volkswagen would do anything would affect her. She wasn't certain.

The Court: Of course. She wanted to make an honest answer. I watch you. You don't seem to crackle right along. From time to time you want to think about your answers or even your questions.

The point is, she always comes to the right conclusion, and she says, "I didn't see it myself."

Mr. Dolan: I know that. When she hesitated to responding to the question—

The Court: I'm in the business of fact finding. I believe that woman. I have a problem with Juror No. 1. This one I believe.

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The juror who comes forward and will make truthful answers is not the problem.

Mr. Dolan: I wish we didn't have the problem at all, but we have to deal with it.

The Court: I'm doing what I can do for you.

Mr. Dolan: I'm not complaining about what you are doing.

The Court: I got to get Juror No. 1 over (3823) here unless you want to forget about that. What?

Mr. Dolan: No. You'll have to get her over.

The Court: Do you want her?

Mr. Dolan: Yes, sir.

The Court: I guess we have to, don't we?

Mr. Wallace: I guess we have to.

(The following occurs in open court.)

The Court: Juror No. 1, may I see you for a moment, please?

(The following occurs at sidebar.)

Juror No. 1: Yes?

The Court: It has been brought to my attention that perhaps your husband or somebody said something to you about this television program.

Juror No. 1: Only mentioned one name. That was it.

The Court: What did he say?

Juror No. 1: He said, "I heard of a man named Byron Bloch. I mention witnesses when I come home. He said, "I heard the name." That's all. No other information that he told me.

The Court: Did he tell you anything about what Bloch said on the air?

Juror No. 1: First of all, I was sleeping, so I said, you know, I says you—he would never tell me. (3824) That's all.

The Court: Did he tell you what the program was about?

Juror No. 1: No. That's it. That's why I felt there was nothing to tell because I know nothing at all about that.

The Court: In other words, if I understand you correctly, all he did was said this Byron Bloch, who is a witness in your case, was a witness?

Juror No. 1: Yes. Exactly.

The Court: You told him to turn the rest off?

Juror No. 1: I wasn't up. He wouldn't tell me anything more whether I wanted to or not. I didn't ask him anything and he didn't tell me anything and he didn't tell me anything. That was as much as I know now.

The Court: Any questions you want me to ask her?

Mr. Wallace: No, your Honor.

The Court: Any questions you want me to ask her?

Juror No. 1: I don't know anything about what was on the program.

The Court: Do you want to ask her any questions directly?

Mr. Dolan: No, sir.

(3825) The Court: Will you resume your place, please?

(Juror No. 1 leaves sidebar.)

The Court: I can understand why she felt she didn't have to respond. In any event, it is certainly consistent with what Juror No. 6 said. She came out with it very forthrightly, but I'll hear anything you have to say.

(3826) Mr. Dolan: I'm a little bit disappointed about the fact she had this conversation with her husband. When you asked her under oath, she said no.

The Court: I'm sorry?

Mr. Dolan: I'm a little concerned about the fact that she had this conversation with her husband, which is placed under oath. She denied having any conversation—I forget your Honor's voir dire—but she denied having heard anything at all about the program, and in fact she did. I find that disturbing. I don't know what else her husband may have talked to her about on this program. She has indicated here that there was nothing else, but she also indicated in your voir dire that she had no conversation at all.

The Court: I know. When I summoned her over, I mean, she was very forthright about it. Explained in her own answer that she didn't conceive that this was a response to my initial question, because she learned nothing about it, that is, the substantive matters on the air. She was very open about it. Looking at her, I didn't have the feeling that she was dissembling. I would have, frankly, thrown her off the jury in a second if I felt she lied to me, irrespective of whether she had gotten anything substantive. In other words, if she had lied to me when I first asked her, I would have heaved her.

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Excerpts from Transcript of Trial, December 17, 1979

(7525) Mr. Dolan: Your Honor, I have a motion for a directed verdict based upon the following grounds: At the conclusion of all the testimony in the plaintiffs' case, including rebuttal, I would renew the application that I made (7526) at the close of the plaintiffs' case in direct regard to the failure to sustain the burden with regard to proof of enhanced injury. That is to say, the burden to prove that the plaintiffs sustained—

The Court: I understand.

Mr. Dolan: —an injury over and above the injury that was sustained but for the defect. I don't think anything was added at this time to that claim. I would renew that application.

With regard to the side window claim as distinguished from the windshield claim, if your Honor please, I don't believe that the plaintiff has sustained its burden with respect to it. All of the improvements, if you will, or the designs that have been discussed and placed in evidence by the plaintiff are directed towards the windshield.

It is basically, as I view the evidence and reviewing the transcript, a windshield case as distinguished from a side window case, absent any proof of the type which we feel is required in that regard under Huddell. We request that that claim be dismissed at this point in time, quite aside from the application across the board with respect to all window retention systems.

Bear with me just one moment, will you, Judge?

The Court: Sure.

(There is a pause in the proceedings.)

(7527) The Court: As you know, I'm trying to move this along. Not in my interests, but to achieve what you want.

Mr. Dolan: Your Honor—

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The Court: Would it not be sufficient for your purposes merely to say you renew all the applications you made at the close of the plaintiffs' case?

Mr. Dolan: Yes, sir. I also have, if you will, a new twist. It will take me just a moment to identify it for the Court.

The Court: Go ahead.

Mr. Dolan: With regard to the constant velocity joint, sir, a motion which I would like to make now but did not make earlier.

The Court: Go ahead.

(7528) Mr. Dolan: With regard to the absence of proof, so far as that claim is concerned, we feel that the proofs have been defective—the plaintiff's expert simply points to a defect in—rather, a surface crack in the fracture of the ball cage taken after the accident, and there is really no proof that it was at the time of manufacture.

And, finally, there has been absolutely no proof introduced by the plaintiffs with regard to whether or not the window retention system is of any kind can act as an effective occupant retention system or restraint in a rollover accident.

As far as those proofs are concerned, we feel that the plaintiffs' proofs are fatally defective and I would make an application along those lines.

That's basically the points that I would like to raise at this point and move for a directed verdict on those issues at this time, sir.

The Court: Your motions are denied.

You went to the last first, as the Bible tells us. Mr. Camps has just testified that very way.

So far as—he just testified that windows can be and should be effective rentention systems.

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Indeed, I gather that was the whole agreement, such as there was between yourself and Mr. Dolan. The witness for both of you recognized that was precisely what 212 was (7529) aimed at.

He did testify that with a proper adhesive system or better design, not only would a windshield be a better retention system but in fact this particular windshield would have retained the occupants during a rollover—this very rollover.

So far as the side windows are concerned, the jury is certainly justified or would be justified in finding, if it chose to, that the improved window retention system suggested by the plaintiff in this case would be equally applicable to side windows as well as windows. There doesn't seem to be any reason why if they should be used in the one they should not be used in the other, or, at least it's a jury question.

So far as the constant velocity joint, your point that there is no evidence that the surface cracks were there at the time of the manufacture is directly refuted by Dr. Apelian and I think to some degree even by—I think that's right.

There is evidence in the record from which the jury may find they were there at the time of manufacture. Indeed, your own quality control man has testified that such surface cracks do appear, albeit infrequently from time to time in the manufacture and has described how they are created. He showed us the mechanical arm that comes and (7530) picks us up.

Finally, concerning any possible causal relationship between a possible defect in the constant velocity joint and the accident, it's a straight jury quesiton. There is a dispute in the testimony concerning it. The jury has to resolve it.

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For those reasons, therefore, precisely because each one of these things is a jury question, and there is sufficient evidence in the record from which the jury may find for the plaintiffs, I do not say they must find, but they may find, I must deny your motion.

Now, it is twenty minutes to twelve. You will want a chance to just catch your breath, I think. Right?

Mr. Dolan: Yes, sir.

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[Summation by Henry H. Wallace, Esq.]

(7638) There is another thing that you can look at, where it just doesn't fit together like a glove. In fact, Dr. Lytton's theory doesn't fit together at all. He made us a drawing of the ball cage being broken here and here by torsion on the wheel shaft—I don't have one right here, but torsion on the drive shaft that went in, you know, crunched in down here and made that mark. It indicated the balls in the ball cage to embed up here and down here in the constant velocity joint.

We have to go slow and really think about that for a minute. This is where the shaft. It is folded solidly right on. Six bolts.

This is the outer race. This is the dust cover. They are bolted together tightly.

The drive shaft—I'll show it this way. The drive shaft, represented by this little stub, here, is going into here, into the ball cage. The question then becomes did the constant velocity joint break from the outside in or inside out? Did the ball cage on the inside break and cause it to break or were forces from the outside, as Lytton said, (7639) caused to make it break from the outside? Well,

the ball cage is inside this big outer race. There is not an impact mark on the outside of that outer race. So we know that the ball cage didn't get injured that way while it was in there. The only way it could get injured—and Dr. Lytton testified to that—is when the drive shaft clanks down. It makes this dent, here. And he would have us believe that when it did that it cranked down because everything is turning now, all together. It cranked down and one ball hit up here.

The plaintiffs would have you believe that the ball cage broke before that cranking down happened, before all that damage to the undercarriage, all that twisting. Dr. Lytton agreed with me and I agreed with him on that, that there was, you know, impacts and damage and all that underneath there. The question was, what triggered it?

If you crank down on the drive shaft, here, you make one ball come up on the opposite side and make a dent on the other side of the dust cover. The plaintiffs' contention is that the balls got out because the ball cage broke, that they all jammed up in there, first. When it was all jammed up it was an abrupt, short seizing, which was enough to throw off a little skid mark and make the vehicle roll over.

Well, who is right and who is wrong? When you get into the jury room you'll get a chance to look at the dust (7640) cover. I submit the dust cover is very, very important piece of evidence. Here's the mark where the drive shaft came down. On the other side, there is a mark that a ball made in the dust cover. It is plaintiffs' contention that all six balls were out first. If you look at how this works, when this goes down one comes up, one, only one, and you make a mark in the dust cover, maybe a slight dent with these two, but one can really make a mark;

right? Six marks inside the dust cover, indicating clearly that before this cranking happened all six, one, two, three, four, five, six balls were out. And, in fact, if you look closely, you can see that the drive shaft crunched down over, here, the mark made by the sixth ball, and halfway obliterated it. You can just see part of it and you can see the metal folded right over it. Indisputable evidence that all six balls got out first.

(7641) Well, could that have happened or could this have cracked around, you know, the driveshaft cracked around and taken one ball and somehow made the marks? Well, the dust cover isn't ripped all the way off from the cranking around. Remember, this is all turning.

Remember how Dr. Brenner testified? He testified that the CVJ goes this way, with torque. It goes up and down, permitting going over bumps, and it also—say it this way: It goes in and out. This one doesn't want to go in and out, but it does. It goes in. You can see it. You can work it yourself in the jury room. It goes in and out. That's so as the wheel goes up and down the length of the driveshaft gets longer and shorter, deeper or shallower into the CVJ.

Dr. Brenner testified, because Dr. Brenner was an automotive engineer, a traffic engineer, and a safety engineer, not a metallurgist. So, he applied what Dr. Apelian had found and he testified that the ball cage broke. Seizure and a cranking like a broken coat hanger, exactly like what we see here.

I would ask you when you get into the jury room, each one of you take your time and look very carefully at the six marks inside the dust cover and look at where the driveshaft bolted down over and the six—this mark, which I submit proves the balls were out first.

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Excerpts from Transcript of Trial, December 18, 1979

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(7704) The Court: All right. Ladies and gentlemen, you will kindly retire to your jury room. I think—I have arranged for you to get some coffee and so forth—at 10:30, was it?

The Clerk: Yes.

The Court: It will be at 10:30 for you. I got another case stacked up out there that I am going to have to deal with for a little while. As soon as I finish that, I estimate it will take about an hour, I'll bring you (7705) back. I'll give you the instructions on the law, and you'll begin to deliberate.

The alternates will be kept, so you all please pay attention to the instructions on the law, just as the regular jurors will be, the jurors in the main will. Then, very shortly, you'll be deliberating.

Now, have they filled out a lunch list then?

The Clerk: Yes.

The Court: That's all done?

The Clerk: Yes.

The Court: I'll let you know when the lunch will be here. Let's shoot for 1:00 o'clock, tentatively, on the theory that I'll be able to get these good people back out here and instruct them and back in the jury room before that.

Thank you. You may retire.

(The jury leaves the courtoom.)

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[CHARGE TO THE JURY BY HONORABLE HERBERT J. STERN, U.S.D.J.]

(7758) The next element that the plaintiffs must establish by the greater evidence—by the greater weight of the evidence is the extent to which their injuries were enhanced because of the design of the window retention system used in the Type 2 vehicle. In other words, the plaintiffs must prove the extent to which their injuries were greater than they otherwise would have been after the same accident as a result of the use of the window retention system in the van at the time of the accident. Plaintiffs must prove this because an automobile manufacturer is liable under this second theory of liability only for the enhanced injuries attributed to the negligently designed product.

In other words, if you find that the defendants were negligent in not employing a safer window retention system or side—or windshield retention system, your next consideration would be whether the plaintiffs have established that their injuries were caused or enhanced by the defendants' negligence.

If, from the evidence presented, you find that the plaintiffs have failed to prove by a preponderance of the evidence any one or more of the essential elements, your verdict on the second section of liability will be, of course, for the defendants.

I wish to add one final caution. Whether or not the plaintiffs in this case were wearing seat belts at the time (7759) of this accident is of no concern to you. Under the law, they had no duty to wear seat belts. You must not speculate, consider or even discuss whether or not they have seat belts on or what their injuries might have been one way or the other. They had no duty to wear seat belts.

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You will also recall, ladies and gentlemen, that I permitted the issue of seat belts for a very limited purpose only. You will remember that I told you I would permit the question of seat belts only as it pertained to the reasonableness of the design. That is to say, was it reasonable for Volkswagen to design a windshield or side window retention system on the assumption that the occupants would be wearing seat belts? However, even that is no longer in the case, because you will remember the testimony of Mr. Pohl, who testified that Volkswagen in designing its windshield and its side window retention system did not assume that the occupants would be bearing seat belts. Therefore, there are no seat belt considerations in this case.

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(7784) The Court: Okay. A couple of other brief instructions.

Any verdict you reach will have to be unanimous. You just can't render a verdict as to anything; liability, damages or anything, unless it is unanimous.

Second of all, I want you to fill out the Interrogatories fully at the time you render a decision.

I'll let you select your own spokesman. When you come back, whoever you wish will be your spokesman. That is consistent with the same process that brings you in the room to begin with.

The alternates may not be present when you deliberate at any time, but I will keep them available separately. They'll get their lunch. They'll be kept in a separate room.

You may, when you leave here, go into your jury room. Do not start to deliberate until the alternates have left the room. Their lunch will be there. They'll know what

they ordered. Please take your lunch and your personal belongings and withdraw from the room. You'll be immediately taken to another room. After they leave, you may begin to deliberate.

I don't know what to do about these exhibits. I generally send the exhibits into the room. I will send all but the very bulky exhibits into the room. I'm not going to send (7785) that piece of door in there nor all these windshields in there, for in my judgment it would be dangerous.

I'm not going to send, in other words, large, bulky thing, nor this model. But they are here. If, for any reason, you wish them, you may ask for them. Then they will be brought in. But I don't want to cram the room full of things which would possibly, you know, may be dangerous to you. I'm not making a selection on any basis other than that, you know, for the obvious ones. If you want an exhibit that isn't in there, just summon for it and it will be sent to you.

Anything? No. Okay.

You may retire—wait. Swear in the Marshal.

(Marshal sworn.)

The Court: All right. Thank you, ladies and gentlemen.

(The jury leaves the courtroom at 1:06 p.m.)

Mr. Dolan: I have just one request, Judge, with regard to the exhibits. I would like to ask the Court to have the one large survey in the jury room.

The Court: You can have that. I don't care about those things. You can have all these.

Mr. Dolan: Fine.

The Court: All of these cardboard things. I'm frightened, literally, of that door. Got jagged edges on it.

(7786) Mr. Dolan: Fine. That's fine.

The Court: The windshields I don't think will be in there. If they want it, they can summon.

Mr. Dolan: I have reviewed our exhibit list with Mr. Wallace. We have reached total agreement on that, so there is no problem. I'll straighten it out with Mrs. Smith.

The Court: All right. Mrs. Smith, you have the Interrogatories?

The Clerk: Yes.

The Court: All right.

Now, I suggest you folks can take your ease. Why don't you come back around 2:30? I don't think we'll have a verdict by then. You know, there may be some questions. If there are questions and I can't find you folks, I'm going to have some trouble.

Mr. Dolan: Be back at 2:30?

The Court: Is that all right with you?

Mr. Dolan: Yes, sir.

(The Court recesses at 1:08 p.m.)

(7787) (Court resumes at 3:10 p.m.)

The Court: Be seated. I have a note from the jury.

Don't look so happy about it, because I don't think anybody is going to understand it. I'll read it to you, exactly what it says.

"Are we entitled to have the depositions of Ramos, Maldonado and the others from Volkswagen?"

You cannot get the full flavor of this note unless you see it, so show this to counsel, please.

Appendix N

(Note shown to counsel.)

The Court: I don't even know what they are talking about. I mean, I don't even have a guess as to what they are talking about, and I think what I would like to tell them is "No," rather than get involved in what they are talking about, because nothing about what they are speaking can bode any good for any of us.

Anybody object to that?

Mr. Wallace: No, your Honor.

Mr. Dolan: No, your Honor.

The Court: All right. What I propose to do is bring both the alternates and the regular jurors, so the alternates can hear what the note is and get the answer, just in case we have to substitute an alternate.

Is that all right, gentlemen?

(7788) (No response.)

The Court: Bring in both the alternates and the jurors, please.

Mr. Dolan: Your Honor, after the jury goes back, I just want a chance to write down the note.

The Court: I'm going to file it. All communications from the jury will be filed with the Clerk. We will have it forever.

Mr. Wallace, I think I owe you a little bit of apology. I think I was a little tough on you at the last sidebar. I was tired.

Mr. Wallace: I accept the apology. I think I went a little too far at sidebar, and I thank your Honor.

The Court: Off the record.

(Discussion off the record.)

Appendix N

(The jury enters the courtroom at 3:15 p.m.)

The Court: I have a note which I'm going to read for the record because the alternates don't know what it is.

"Are we entitled to have the depositions of Ramos, Maldonado and the others from Volkswagen?"

I'm not at all sure that I understand what is wanted by the note. It may be that you are asking for the trial transcripts to be sent in. It may be that you are asking for deposition transcripts which, of course, are something else again, to be sent in. But in neither event can I give you what (7789) you asked for.

First of all, the reason why I cannot send these things in to you is—although probably maybe you're asking this because you have seen us with the blue books and you know there is a transcript. You must remember in these books there are a lot of things which you were not permitted to be present for and they were conducted outside your presence. But they were all dutifully written down by Mr. Rizman, here.

If I send that material in to you, I have no way of editing it and you'll be deliberating on matters that you weren't permitted to hear in the first instance. That is if you are referring in your question to the trial transcript.

If you are asking about depositions, I must tell you the same thing is true. Not all of every deposition was read to you. In these books there are many things which both sides agree you shouldn't see. So I cannot simply send transcript in the room, either deposition transcript or trial transcript. I'm sorry I'm unable to accede to your request. I simply am not.

Kindly resume your deliberations.

(The jury leaves the courtroom at 3:18 p.m.)

Mr. Dolan: I was just wondering, Judge, how long you intend to have them deliberate and whether or not you have given any thought to putting them up in a hotel or whatever this evening?

(7790) The Court: My original theory was that I would not put them up in a hotel, but at the time when they would discontinue deliberations to just send them home.

We have four alternates. If, unfortunately, something were to happen to them on the way back, well, we could still substitute an alternate.

In a civil case I don't know if I've ever—at least I don't remember ever, you know, sequestering them overnight, although if you make that application, I'll entertain it. I have no thought to do it sua sponte.

Mr. Dolan: I would make that application.

The Court: You want them all locked up?

Mr. Dolan: Yes, sir.

The Court: Why?

• • •

(7793) The Court: By the same—by the same token, the ability to substitute a juror as time goes on becomes more questionable, although the defendant said they're willing to do it now. Under the federal rules, I don't know if there is any authority to keep the jury around. I didn't want to mention that before, Mr. Wallace. But, of course, on consent all things are possible.

Nonetheless, as I say, as I go on I learn more and more and more.

• • •

(7804) The Court: Now you're here, I have a note from the jury. It reads as follows:

Appendix N

"Five feel ball cage was defected; one feels it was not."

Here. Here. Read it. Your adversary has had an opportunity to read it.

(Note handed to Mr. Wallace.)

Mr. Wallace: Would you like me to speak to the question?

The Court: If you care to.

Mr. Wallace: I think the jury should be instructed that is the purpose of the democratic system. They should continue their deliberations, and that there are other interrogatories also presented to them, that they might well go onto another one and come back to that. They've only (7805) been out three and a half hours in a case which has taken more than two months.

They should discuss the issue further.

The Court: I don't even know the purpose of this note. I really don't understand the purpose. They've only had the case for three hours.

The clerk of the court tells me she didn't get the exhibits to them until after 2:30 and we got this note about fifteen minutes ago. They weren't even at work for three hours in a case like this. I don't understand it. I don't even understand this note. It is not even in English.

Mr. Wallace: I think, your Honor, they are just giving us a reading of how the deliberations are going. They might be instructed that is not how it is done. If they have a question, that's fine otherwise, it's not what is to be done.

I think, also, that maybe the jury thinks they have to be done by five o'clock. And could they be told there is no time limit, that they have a reasonable amount of time to

reach their decision; that they can go home and come back.

The Court: I can't understand the purpose of the note, except they think five o'clock is quitting time.

Mr. Wallace: I think they may think that.

Mr. Dolan: I don't know, Judge. I don't know (7806) what to say.

The Court: All right.

Bring in the jury and the alternates, please.

As a matter of fact, I think I'm going to send them home. Start out in the morning. There is no point. By the time I finish it will be ten minutes to five. There is no point in sending them in and bring them out fifteen minutes later and sending them home.

Off the record.

(Discussion off the record.)

(The jury enters the courtroom.)

(7807) The Court: Ladies and gentlemen, I have the note from you which reads: "Five feel ball cage was defected. One feels it was not."

I don't know the purpose of that note, really, because I cannot take it from that note that you have, you know, gone as far as you can go with your deiberations in a case which is now in its eleventh week which has consumed 7,500 pages of testimony based on less than two hours of deliberations.

Perhaps you have sent me this note because it is nearing five o'clock and you believe five o'clock is quitting time, and we'd like to know how you feel about it at this stage. I don't know. I am not saying that, you know, you have to reach a verdict or that you don't have to reach a verdict or anything other than that it would be very sur-

prising if, in the give and take of the jury room in a case such as this, you would have reached a final position, all of you, so quickly. And even if you had, you even have other things to decide in this case.

There is a whole separate area for you to consider. One of the things about this system is I'm not permited to ask you questions about what is going on in there. If I could, I have no desire to.

So I make these observations. They may be totally out of place. I may not be in the right area. But I'm going (7808) work under the assumption that you sent me this note because it was near five o'clock and you felt, you know, five o'clock was the end of the day. Usually it is. Not when a jury deliberates.

In this instance, however, I will make it the end of the day. You people are tired. You have had a lot to do in two days. You have had a lot of summations and you've had a very long day today.

Tomorrow morning you'll begin the deliberations in earnest. I instruct each one of you, alternates as well as jurors, to bring an overnight bag with you. Tomorrow you'll have the exhibits in the jury room promptly when you report at nine o'clock. And you may begin the process of deliberation.

I'm certain that you people would want to devote substantial time and attention to this matter. You have all seen the great care and the substantial effort which has been made by the plaintiffs and by the defendants in this case to present their respective cases to you. I know that you will want to give this your fullest attention in concert with your fellow jurors, exchanging your views and carefully considering the evidence.

Madam, I believe you have a doctor's appointment, do you not?

Alternate Juror No. 4: Yes.

(7809) The Court: You are the fourth alternate. If you wish to be excused from coming tomorrow, I will excuse you.

Alternate Juror No. 4: Do I come in the next day if they're still—no? I'm off, then?

The Court: You are finished. In the event there was some disability of one of the main jurors, the next juror, Alternate No. 1—it is highly unlikely that you will get to sit on this case. So if you wish to be excused to attend your physician's appointment, I will excuse you, because weighing the probabilities, it is not likely that you will be called upon to deliberate. Of course, if you wish to come, you are entirely welcome. I'm not directing you not to come, but I'm giving you the choice.

Alternate Juror No. 4: Are you waiting for me to say—

The Court: No. You'll either be here or you won't.

Alternate Juror No. 4: I won't.

The Court: Didn't think you would. There is no reason why you should.

• • •

Appendix N

Excerpts from Transcript of Trial, December 19, 1979

(7821) The Court: In any event—look, the situation we face is this: It is 9:30. We have two jurors missing but we have all the alternates in. I'm going to put in the two alternates. It will leave us one alternate, in addition. Perhaps with this we'll be able to overcome whatever it is that was the trouble yesterday, because they had no fair opportunity to deliberate at all and the note was not even—I mean, it was barely decipherable, you know. So that's what we'll do. We'll get this case going along. Bring in the jurors and the alternates.

• • •

(7824) The Court: I salute your ability to brave the weather and get here. Reverend, you see why it was very prudent for me not to release you yesterday. All right. Reverend, you are now Juror No. 2. Sir, you are now Juror No. 3. You, sir, are now our only alternate. Take good care of yourself, will you?

(7825) I want you to begin your deliberations anew. Actually, you hardly had started them yesterday. You didn't get these materials until nearly a quarter to 3:00, and you were in here twice before 5:00 o'clock. Start all over again. Take a fresh look at everything, begin discussing this thing.

Any problems? Now, it may be that I didn't make myself clear in my main instructions. Any verdict you reach on any issue in this case, for or against any party, must, of course, be unanimous. You don't have a verdict unless it is six, one way or the other way on any issue.

Any question about that, ladies and gentlemen?

All right, please begin your deliberations.

• • •

(7834) (Court reconvenes at 2:05 p.m.)

The Court: You have an application?

Mr. Dolan: Yes, sir.

The Cour: Yes, I'll hear you.

Mr. Dolan: If your Honor please, my application is addressed to the procedure regarding the substitution of the alternative jurors in this case.

The Court: You mean the ones that are left?

Mr. Dolan: No, sir. The two who were substituted this morning, as they were alternates as they came in, now, of course, they are contemplating as part of the regular panel.

The Court: They have been deliberating now for, I guess, four and a half or five hours.

Mr. Dolan: Yes, sir.

Following this morning's procedure the thought occurred to me—late this morning, before lunch, the thought occurred to me with respect to the procedure which was followed in connection with substituting those two for the two jurors who arrived here late this morning.

In checking it out, sir, I have specific reference to Rule 47. And with the Court's permission, I'm just going to read so that I don't misquote it just the two sentences from the rule which I'd like you to take into consideration.

"Alternate jurors in the order in which they are (7835) called"—I'm sorry. I'm reading from 47(b), if I didn't already state that.

"Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires

to consider its verdict, become or are found to be unable or disqualified to perform their duties."

And then skipping to the next sentence. The next complete sentence reads as follows: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

The Court: Absolutely correct.

Do you have the minutes of yesterday?

Mr. Dolan: I do not, sir.

The Court: I remember very clearly what occurred.

Mr. Dolan: In my view, sir, in reading this particular part of the rule, the procedure which was endorsed this morning by substituting the two alternate jurors for the two regulars who arrived late was not allowed by the rules—

The Court: Absolutely correct.

Mr. Dolan: —and that that is a mandatory proceeding. And I don't think the fact that counsel consented thereto can cure the error.

The Court: Wrong. When you check the minutes from yesterday you will see that I asked both sides whether they wished me to keep the alternates. You will see that at (7836) that time I told both sides that it was not authorized by the Federal Rules. But I said, of course, even though the rules require that I discharge the alternates, counsel on consent can do otherwise. I have a specific recollection of saying that yesterday.

(7837) So, first of all, the startling pronunciamento which you have made is nothing other than an echo of what I said yesterday. You were, therefore, on full notice as to what the rules were and agreed that we might keep the alternates.

This morning it was agreeable to both sides that we should de exactly what we've done, and more than that,

I think it was your suggestion that we keep the remaining alternate, and when the two other jurors showed up late, I believe it was your suggestion that we keep ahold of them, too, and make them new alternates.

Obviously, the Federal Rules of Civil Procedure prescribe what this court may order, sui sponte, but when both sides say that they will be content with a certain procedure, there is nothing that I know of, no reason why I know of, that the Court cannot accede to it, provided it doesn't violate some sort of public policy. This, obviously, does not.

But, more than that, more than simply a contract by agreement, we have in this instance an estoppel. It was with your consent that we didn't wait for the remaining jurors but in fact substituted the alternates and let the deliberations go forward.

I don't think, in all fairness, that you can be heard now to ask for a mistrial for a procedure which (3338) you have two days now endorsed fully and which, in reliance thereon, the entire trial has gone forward on that basis.

Not only that, but with full knowledge and awareness, because I said yesterday that I could do it only by consent, because the rules didn't authorize it.

Under these circumstances, in a case such as this, where the trial has gone forward for ten and a half weeks, I guess, the plaintiffs are individuals whose resources are obviously finite, they are suing one of the great corporations of the world, a mistrial in such circumstances is the equivalent of total victory, or so close thereto as to be without distinction for the corporation. Under these circumstances, where the corporation, ably represented, elects to proceed on a certain course, not only with imputed knowledge but with actual knowledge because I said so

yesterday, that they didn't have to, when twice with that actual knowledge they go forward and endose a procedure, they cannot be heard later to underdo it all to the extent that a ten and a half week trial gets washed out, 7500 pages of record get torn up, thousands of pages of exhibits are heaved aside, and the plaintiffs, who are crippled, severely injured as a result of an accident, must do it all over again. That result would be unconscionable. Therefore, I have to reject your application.

(7839) Mr. Dolan: Just to complete my application, sir, it would be for a mistrial on that basis.

The Court: I had that feeling.

Mr. Dolan: I don't think I stated that.

The Court: You are right.

Mr. Dolan: It is our view that there is no discretion, notwithstanding the consent of counsel; that it is an absolute rule in that respect.

The Court: Mr. Dolan, constitutional rights may be waived. Even the most fundamental rights known to human beings in this society may be waived, including the right to remain silent, Sixth Amendment rights to counsel. All of this may be waived provided that the waiver was knowing and voluntary.

I am fully confident that even such a substantial right, if it be deemd a right, to have alternate jurors discharged the moment the case goes to a jury,—a provision which, by the way, makes little sense, which certainly is violative of the state practice in most states, certainly this one—has nothing to do with public policy, and it's a disaccommodation to litigants who have to try cases for weeks and then may see a juror become ill ten minutes after the case goes to them.

But, if it be a right, I am fully confident that such a right as that one is waivable.

* * *

(7852) The Court: I have a note. All it says is: "We've reached a verdict."

So here. File the note, please.

Bring in the jury, please.

(The jury enters the courtroom at 5:46 p.m.)

The Court: All right. Proceed.

The Clerk: When I call your names, please answer here.

(Roll call. All jurors present.)

The Court: All right.

Ladies and gentlemen, I understand you've reached a verdict; is that right?

Juror No. 1: Yes.

The Court: May I have your sheet, please?

(Verdict sheet handed to the Court.)

The Court: All right.

Do you have a copy of the interrogatories?

Thank you.

Would you hand this back to the forelady, please.

(Item handed to the forelady.)

The Court: I'm going to, unless there is an objection, I'll go through the interrogatories and the various things and ask the forelady each question. Is that all right?

(7853) Mr. Dolan: Yes, sir.

Mr. Wallace: Yes, sir.

The Court: Madam, the first question is:

Appendix N

"Was the ball cage in question defective and unreasonably dangerous to the user at the time of its manufacture and sale?"

Juror No. 1: Yes.

The Court: "If defective, was the ball cage in question the proximate cause of the accident, resulting in injuries to the plaintiffs?"

Juror No. 1: Yes.

The Court: "Was Volkswagen negligent in the design of the windshield retention system in question?"

Juror No. 1: Yes.

The Court: "Was Volkswagen negligent in the design of the side window retention system in question?"

Juror No. 1: Yes.

"If that negligence"—"If negligent, was that negligent design for windshield and/or side window retention the proximate cause of the injuries which were sustained by Barry Lynn Seese?"

Juror No. 1: Yes.

The Court: "Reinaldo Irizarry?"

Juror No. 1: Yes.

The Court: "Jose Torres?"

(7854) Juror No. 1: Yes.

The Court: "Martin Ramos?"

Juror No. 1: Yes.

The Court : "In what amount do you assess damages as to Barry Lynn Seese?"

Jurior No. 1: Six hundred thousand.

The Court: "As to Reinaldo Irizarry?"

Jurior No. 1: One million dollars.

The Court: "As to Martin Ramos?"

Juror No. 1: Two hundred thousand dollars.

The Court: "As to Marcos Torres for the Estate of Jose Torres?"

Juror No. 1: One hundred fifty thousand dollars.

The Court: Let me have that sheet again, may I?

As to Barry Sesse, six hundred thousand dollars; Reinaldo Irizarry, one million dollas; Martin Ramos, two hundred thousand dollars, and the Estate of Jose Torres, administrators, one hundred fifty thousand; is that correct?

Juror No. 1: I think so.

The Court: All right.

Do you wish—either side wish the jury polled?

Mr. Dolan: I do, your Honor.

The Court: Kindly poll the jury.

The Clerk: When I call your name, please indicate whether or not you concur in the verdict as rendered by your (7855) forelady.

Mr. Dale.

Juror No. 2. Yes.

The Clerk: Mr. Mason.

Juror No. 3: Yes.

The Clerk: Miss Trattou.

Juror No. 4: Yes.

The Clerk: Mr. Maniscalki.

Juror No. 5: Yes.

The Clerk: Mrs. Sharaba.

Juror No. 6: Yes.

The Court: All right.

The interrogatory and verdict sheet will be filed.

If there is no other business for the jury, I'm going to excuse them.

Mr. Wallace: Yes, your Honor. May we see you at sidebar, please?

• • •

Opposition

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No. 81-339

IN THE

Supreme Court of the United States

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v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, plaintiffs below, respectfully request that this Court deny the Petition for a writ of certiorari seeking review of the Opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. 1a-33a) is reported at 648 F.2d 833.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1981. A petition for rehearing *en banc* was denied on June 26, 1981. The petition for writ of certiorari was filed on August 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1524(1).

FEDERAL RULE PROVISION AND STATUTE INVOLVED

The questions presented in the Petition involve Fed. R. Civ. P. 47(b) and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381, *et seq.* (1976).

STATEMENT

The petitioners' Statement of the Case is, for the most part, satisfactory to the respondents. To the extent that inaccuracies in the petitioners' Statement may be significant, they will be dealt with in the Argument herein.

ARGUMENT

I. No Issue Is Properly Presented As To Fed. R. Civ. P. 47(b)

The first half of the Petition addresses the question whether Fed. R. Civ. P. 47(b) was violated when, "without an express and intelligent waiver" by petitioners, alternate jurors were retained and later substituted for absent jurors after jury deliberations had begun. (Pet. i). The case, however, poses no such question because the retention and substitution of the alternate jurors were both done with the petitioners' *express and repeated agreement.* (Pet. App. 28a-29a).

There is no conflict among federal courts of appeals as to whether Rule 47(b) may be waived in such circumstances. Petitioners' assertion that their consent was coerced (Pet. 10) is not and cannot be supported. They seem, indeed, to be still pursuing the unconscionable ploy so eloquently denounced by the trial court. (Pet. App. 28a-29a).

II. No Issue Is Properly Presented As To The National Traffic And Motor Vehicle Safety Act

The second half of the Petition advances the proposition that the Nation Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381, *et seq.* (1976), "preempts second collision liability judgments based upon jury imposed standards inconsistent with the Federal Safety Act" and that the trial court's jury instructions on North Carolina law violated that preemption in two respects (Pet. 18).

This contention is disposed of by the express wording of the Safety Act itself: "Compliance with any Federal motor vehicle safety standard . . . does not exempt any person from liability under common law." 15 U.S.C. § 1397(c) (1976). *See Dawson* v. *Chrysler Corp.*, 630 F.2d 950, 958 (3d Cir. 1980).

Moreover, there was plainly no inconsistency between the jury instructions and any Federal Motor Vehicle Safety Standard (FMVSS) issued under the Safety Act. Petitioners' first complaint, that the trial court "excluded all evidence of the installation of seat belts" (Pet. 22), is factually false. The trial court specifically allowed evidence on the availability of seat belts in support of the "crashworthiness" defense. (Pet. App. 17a). Later, however, petitioners' princi-

pal expert witness admitted that "VW did *not* consider seat belts as an element of its window retention design that would protect the occupants of a Type II van from ejection in a roll-over accident." (Pet. App. 17a). This concession made the use of seat belts irrelevant to the issue of whether the window retention system was negligently designed, and the trial court so instructed the jury. The Court of Appeals upheld that ruling. (Pet. App. 18a). The Petition fails to show how the ruling could possibly have violated the Federal Safety Act.

Petitioners' second argument is that the instructions somehow conflicted with the exemption accorded the VW Type II van from FMVSS 212, which governs window retention requirements in a 30 m.p.h. forward crash. As the Court of Appeals stated, "This 'exemption' was not because window retention was regarded unimportant or impossible on vehicles such as the VW van, but rather because the windshield of the van, due to its unique configuration would shatter on impact with the frontal barrier that was used in the test." (Pet. App. 25a). The trial court therefore correctly instructed the jury that Standard 212 did not cover the Type II van, but could be considered simply as evidence on the proper design of windshield and window retention systems. (Pet. App. 26a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

SUMMARY

The Petitioners' Supplemental Brief, while purportedly filed under Rule 22.6 of this Court, plainly violates that Rule and should, therefore, be rejected.

ARGUMENT

Rule 22.6 permits a party to file a supplemental brief in connection with a pending petition for writ of certiorari, but only to call attention to "new cases or legislation or other intervening matter *not available at the time of the party's last filing.*" Emphasis supplied. The matters which petitioners seek, by their Supplemental Brief, to bring to

this Court's attention were available to them when they filed their petition on August 21, 1981; indeed, they concede that they had brought those very matters to the attention of the court below in support of their August 18 motions for a further stay of mandate and for leave to file a second rehearing petition. Supplemental Brief at pp. 2-3. There is, therefore, no reason for those matters not to have been included in the petition for a writ of certiorari, and no entitlement under Rule 22.6 to raise them now.*

CONCLUSION

The Supplemental Brief should be ignored and the matters raised therein should not be considered.

Respectfully submitted,

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*The fact that the petition for certiorari was filed just one day after the denial of petitioners' motions below on August 20, 1981, suggests that they must have written it and had it printed in advance, in anticipation that their motions below would be denied. They had until September 23, 1981 to file their petition, Supplemental Brief, Appendix, at 273a, but presumably chose to file it before expiration of the stay of the mandate on August 24, 1981, rather than seek a stay from this Court under 28 U.S.C. § 2101(f) and this Court's Rule 44. Even granting, *arguendo*, that petitioners could justify their procedural preferences, there was, of course, nothing to prevent them, in the week or so from the time they prepared the motions filed below on August 18 and the expiration of the stay on August 24, from revising and reprinting their petition to include the matters they now urge as significant.

Petitioner's Reply Brief

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NO. 81-339

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

VOLKSWAGENWERK, A.G., a West German Corporation and VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation,

Petitioners,

vs.

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator for the Estate of JOSE TORRES, Deceased,

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PETITIONERS' REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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9 Prod. Liab. Rep. (CCH):
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ARGUMENT

1. Federal Rule 47(b) of the Federal Rules of Civil Procedure is mandatory and requires dismissal of the alternates.

Respondents' brief in opposition to the petition (hereinafter referred to as "Respondents' First Brief") totally "misses the mark" regarding the important issue presented herein under Federal Rule of Civil Procedure 47(b). The rule is *mandatory* and requires alternate jurors to be discharged after the jury retires to deliberate.

In this case, four alternates were retained by the trial judge. They were not discharged when the jury began its deliberations. They remained at the courthouse for the entire balance of the day without instruction. Appendix N at 218a to 225a (hereinafter referred to as "App." with citation to the appendix page). They were later assembled together with the deliberating jurors when the court responded to a note sent by the deliberating jurors. App. at 219a. The alternates were then separated again, *but not discharged,* and they received no further instructions. App. at 220a. The alternates were assembled still another time together with the deliberating jurors when the court responded to another note indicating that the jury was split on liability. App. at 223a. The trial court then excused the jurors for the evening and instructed both the jury and the alternates to return in the morning. Even at that point, the alternates were not discharged as required by Rule 47(b). App. at 224a to 225a.

The next day, two of the alternates were *substituted* by the judge for two jurors who were delay. App. at 226a. The dispute regarding an alleged "waiver" or "consent" by counsel focuses on the court's action in *substituting* the alternates. Respondents contend that a consent and waiver to *substitution* occurred. Petitioners contend that no express consent or waiver of the kind required to waive was manifested even if waiver is permitted. Counsel simply did not object as the court simply announced its decision. App. at 226a. Both the trial court and the Third Circuit

focused upon the issue of "consent" or "waiver" only with respect to the trial judge's act of *substituting* the alternates. App. at 28a to 29a. *Seese* v. *Volkwagenwerk, A.G.*, 648 F.2d 833, 847-49 (3d Cir. 1981). However, neither the trial judge nor the Third Circuit had considered whether the trial court's failure to discharge the alternates in the first place violated Rule 47(b)'s explicit admonition. Had the court followed the mandatory rule, there would be no dispute over whether there was, in fact, a "waiver" or "consent." The foregoing distinction between the court's failure to discharge the alternates, as opposed to the issue of later substitution (with or without consent), is crucial.

Rule 47(b) is a mandatory rule directed to judges not lawyers. If it is to have any meaning, the word "shall" cannot be read to mean "may" or "can". The ensuing potential for mischief, debates about dubious and "gray area" consents or non-objections, coercion, and related difficulties all flow proximately from one act and one act only: failure to discharge the alternates as required.

The wide-ranging conflict among the circuits on construing Rule 47(b) and its exact counterpart, Federal Rule of Criminal Procedure 24(c), reflects the courts' widespread disregard of the mandatory rule—a condition which itself justified review and correction by this Court.

More importantly, some courts express a *per se* rule which would apply Rule 47(b) as it reads. *E.g., United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 871, 873 (4th Cir. 1964); *United States* v. *Chapman*, 584 F. 2d 1358, 1361 (4th Cir. 1978). But *cf. United States* v. *Evans*, 635 F. 2d 1124, 1127 (4th Cir. 1980). Under a *per se* rule, the factual dispute herein about a purported "consent" to substitution would be of no moment and would terminate the fluctuations and inconsistent standards applied in some other circuits. Thus, review by this Court is warranted to

determine whether the rule should be applied *as it now reads* in order to effectuate the relevant policy.

A uniform, mandatory rule written for judges should not, when it is breached, become the mechanism whereby subtle coercions, amorphous statements by attorneys, and equivocal "consents" are later used to excuse or forgive an elementary rule violation. Moreover, contrary to the position of respondents, there are conflicts among the circuits on construing Federal Rule of Civil Procedure 47(b) and its exact counterpart Federal Rule of Criminal Procedure 24(c). Some courts of appeals hold that Rule 47(b) is mandatory requiring no communication between alternates and the jury once the jury commences its deliberations. *See, e.g., United States* v. *Hayutin,* 398 F.2d 944, 950 (2d Cir.), *cert. denied,* 393 U.S. 961, *rehearing denied,* 393 U.S. 1045 (1968).

Another group of courts of appeals holds that the provisions of the rule can be waived if the criteria under *Patton* v. *United States,* 281 U.S. 276 (1930) are met. *E.g., United States* v. *Baccari,* 489 F.2d 274, 275 (10th Cir.), *cert. denied,* 417 U.S. 914 (1974). *But see United States* v. *Beasley,* 464 F.2d 468 (10th Cir. 1972) (en banc indicating approval of *United States* v. *Hayutin, supra.*).

A third group of court of appeals holds that the rule can be waived either implicitly or explicitly. *See, e.g., United States* v. *Davis,* 608 F.2d 698, 699 (6th Cir.), *cert. denied,* 445 U.S. 918 (1980).

Thus, despite respondents' conclusionary statement that there is no conflict, the conflict is readily apparent, running the gamut from mandatory to waivable. It is submitted, however, that the question of waiver of Rule 47(b) is not like waiver of jury trial. Waiver of a jury trial gives the parties the right to another competent fact-

finder, a judge. Waiver of the requirement of Rule 47(b) compromises the competency of the jury especially as here where no guidelines were laid down for the alternates while the jury deliberated. This allows external influences too easily to intrude into the jury process. It is respectfully submitted that the petition be granted so that this issue can be resolved giving the various federal courts one, uniform interpretation of Rule 47(b) and Rule 24(c).

2. The Safety Act and the FMVSS preempt second collision liability judgments based upon jury imposed standards inconsistent therewith.

The National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1381 *et seq.* (1976) (hereinafter "Safety Act") is a pervasive federal regulatory scheme which entrusts the National Highway Traffic and Safety Administration (NHTSA) with regulatory power to prescribe Federal Motor Vehicle Safety Standards (FMVSS) with which all manufactures who sell vehicles in this country must comply. The Safety Act provides in Section 1392(d), in part, that

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. . . .

App. C, 51a. It is clear from this section that federal law regarding safety standards control and preempt state law concerning standards regulating the same aspect. Respondents would have this Court declare that Section

1397(c) renders Section 1392(d) meaningless. Respondents' First Brief at 3. Section 1397(c) merely preserves common law remedies not preempted by the Safety Act. Section 1397(c) does not mean that a state is free, either by jury verdicts or statutes, to prescribe standards inconsistent with the FMVSS established by NHTSA which the manufacturers are required to meet. Similarly, as long as the state statutory scheme or jury verdicts do not proscribe or imply new standards, the manufacturer may not use its compliance with the FMVSS as a *per se* defense. For example, seat belts are governed by FM VSS 209 and 210. *See* 49 *CFR.* §§571.209, .210. If a seat belt failed, the manufacturer could not claim a per se defense of compliance with the FMVSS. However, the jury in deciding the case, cannot be called upon to set a standard for the seat belt assembly, inconsistent with either FMVSS 209 or 210. Thus, neither Section 1397(c) nor Section 1392(d) is a nullity. Rather, each section clearly limits the other. Respondents completely ignore the impact of Section 1392(d) and seek to divert the Court's attention from the significant federal questions raised in the Petition.

Secondly, respondents' statement that it is "factually false" that the court excluded all evidence of seat belts is belied by the record. Judge Adams succinctly stated in his dissent:

> With respect to the crashworthiness claim before us, the existence of seat belts was relevant to the question of reasonableness of the window design in the context of a rollover accident. For this reason, *the ruling by the district court that totally removed such evidence from the jury, constitutes error.*

App. A at 42a (footnotes omitted) (emphasis added). Moreover, the trial judge himself ordered all such evidence excluded from the jury's consideration. App. N at 215a to 216a.

Another specious argument raised by respondents concerns the inconsistency between denial of seat belt evidence and the FMVSS. As Judge Adams set forth in his dissent:

> The very rationale for admitting evidence pertaining to [FMVSS] 212, namely that although VW was not bound by that standard, it was a jury question whether adherence to the standard constituted reasonableness in design . . . should similarly dictate admission of the seat belt evidence. Although plaintiffs were not bound to wear seat belts, evidence of their availability and non-use would properly be factors for the jury to consider in assessing crashworthiness.

App. A 42a, n.12. Clearly, respondents' argument overlooks the importance of seat belts in the FMVSS. It has been the general thrust of NHTSA to attempt to increase safety through the design of seat belts and by increased usage of them. *Cf. Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). In fact, seat belts and restraints have been the cornerstone of the FMVSS. *See* 35 Fed. Reg. 15222 (Sept. 30, 1970). NHTSA invests millions of dollars to educate the public to wear seat belts. *See* [1981] 9 PROD. LIAB. REP. (CCH) at 598 (August 7, 1981). NHTSA also engages in extensive seat belt research. *See* [1981] 9 PROD. LIAB. REP. (CCH) at 516 (July 3, 1981). Thus, to exclude evidence of seat belts in a crashworthy case and at the same time include evidence of an inapplicable standard (FMVSS) clearly runs counter

to the FMVSS and allows, as in this case, a jury to impose a standard inconsistent with the federal standard. The inconsistent standard is that the jury verdict herein requires VW to design its van in compliance with FMVSS 212, from which NHTSA has exempted the van, and at the same time design the van to prevent ejection without regard to seat belts. This jury imposed standard conflicts with FMVSS, and is inconsistent therewith.

Despite respondents' query regarding the FMVSS and seat belts it is clear that the interrelationship between crashworthiness and seat belts under the Safety Act is established by the legislative history wherein the Senate Committee stated:

> The "second collision" the impact of the individual within the vehicle against the steering wheel, dashboard, windshield, etc. has been largely neglected. The committee was greatly impressed by the critical distinction between the cause of the accident itself and causes of the resulting death or injury.
>
> Here, the design of the vehicle as well as the public willingness to use safety devices, such as seat belts, are critical factors.

S. Rep. No. 1301, 89th Cong. 2nd Sess. 2 (1966), reprinted in [1966] 2 U.S. Code Cong. & Ad. News 2710-11. Thus, under the Safety Act evidence of availability of seat belts goes hand in hand in crashworthiness cases with aspects of safety design.

Crashworthiness, as a cause of action, has its genesis not in state courts but in federal courts in diversity actions. In *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the Eighth Circuit promulgated the doctrine under Michigan law. Yet, the Michigan Supreme

Court had not spoken on this cause of action. Similarly, the Seventh Circuit decided that Indiana would not adopt crashworthiness even though the Indiana Supreme Court had never spoken on the issue. *Evans* v. *General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966). Without the Indiana Supreme Court speaking to the issue, the Seventh Circuit reversed itself and declared that Indiana would adopt crashworthiness. *Huff* v. *White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977).

Following the Eighth Circuit's lead in *Larsen*, twenty-eight jurisdictions are listed as adopting crashworthiness. *See id. at* 565 F.2d at 110-11. Of the jurisdictions and cases listed as "following *Larsen*," twelve are federal court decisions making "Erie-educated guesses," see *id.*, just as *Larsen* did. In fleshing out what the federal courts assume state law to be, federal courts in fashioning a cause of action based on crashworthiness have permitted evidence concerning availability and use of seat belts, which is in accord with the purposes of the Safety Act. *See, e.g., Caiazzo* v. *Volkswagenwerk, A.G.*, 647 F.2d 241 (2d Cir. 1981); *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974); *cf. Melia* v. *Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976). Since the Safety Act imposes safety standards under NHTSA to protect motor vehicle occupants by reason of the use of seat belts, the attempt, as here, to have a manufacturer design a vehicle to withstand a violent rollover and prevent ejection without regard to seat belts constitutes the imposition of a standard inconsistent with the Safety Act and such a jury-imposed standard is preempted thereby.

CONCLUSION

The Petition for a Writ of Certiorari should be granted for the reasons set out above as well as those contained in the Petition for a Writ of Certiorari and petitioners' supplemental brief.

Respectfully submitted,

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Dated: September 23, 1981

Petitioner's Reply Brief

2

NO. 81-339

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Wilson v. Ford Motor Company, Docket No 80-1491 (4th Cir. August 14, 1981) 2, 3, 5

NO. 81-339

IN THE

Supreme Court of the United States

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Argument

Respondents, in their opposing brief to petitioners' supplemental brief (hereinafter referred to as "Respondents' Second Brief"), misapprehend the basis for the supplemental brief, and erroneously attempt to focus the Court's attention solely on *Wilson* v. *Ford Motor Company,* Docket No. 80-1491 (4h Cir. August, 1981), (hereinafter referred to as "*Wilson*") Appendix P at 241a, as the basis of the supplemental brief.

In fact the supplemental brief was triggered by the Third Circuit's decision in the matter *sub judice* rendered on August 20, 1981, which petitioners learned about on that day but did not receive a copy of the order until August 24, 1981 which was subsequent to the filing of the instant petition. Without the Third Circuit's order, petitioner could not set forth the specific language of the Order as required by the rules. As soon as the decision was received, petitioners drafted the Supplemental Brief setting forth the Questions Presented by that order. The supplemental brief clearly indicates that the issues therein were raised by the August 20 decision of the Third Circuit.

The Third Circuit's most recent decision in this case has, in effect, created two separate conflicts among the circuits and also violates the standard announced by this court in *Vandenbark* v. *Owens-Illinois, Co.,* 311 U.S. 538 (1941). It is true that petitioners had the Fourth Circuit's decision in *Wilson* on August 18, 1981. Respondents' Second Brief at 2. However, since *Wilson* overruled every North Carolina case relied upon by the Third Circuit in *Seese* v. *Volkswagenwerk, A.G.,* 648 F.2d 833 (3d Cir. 1981) to predict that North Carolina would adopt

crashworthiness*, petitioners appropriately brought the matter to the attention of the Third Circuit by its motion on August 18, 1981. App. O and App. S. At that time, petitioners also brought to the attention of the Third Circuit the decision by the Second Circuit in *Factors Etc., Inc.* v. *Pro Art, Inc., et al.*, 652 F.2d 278 (2d Cir. 1981). App. Q at 244a. Petitioners can hardly be faulted for providing the Third Circuit with an opportunity to correct itself in light of new and compelling legal developments.

Petitioners urged to the Third Circuit that the *Factors* decision compelled the court to defer to *Wilson* as controlling on North Carolina law. The Third Circuit's split decision of August 20 tacitly adopted the position espoused by the dissent in *Factors*** and refused to follow the Fourth Circuit's decision in *Wilson*. App. O. 240a. The Third Circuit's refusal to follow Wilson conflicted not only with

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* It must be noted that respondents in their reply brief nowhere dispute that *Wilson* overruled every North Carolina case relied upon by the Third Circuit, that *Vandenbark* mandates the Third Circuit consider cases on controlling state law, and that the *Factors* decision compels the Third Circuit to follow *Wilson*. The only argument proffered by respondents is that this Court not consider the supplemental brief because of a hyper-technical interpretation of this Court's rules, which, in any event is erroneous as a review of the circumstances plainly reflects.

** The issue therefore is clearly delineated for review by this Court. The majority in *Factors* held in a well-reasoned opinion that where a federal court of appeals had predicted the course of the law of a state within its circuit "federal courts of other circuits should defer to that holding." App 255a. The dissent, implicitly relied on by the Third Circuit herein, urged in a thorough opinion that " 'outsiders' . . . are as fully qualified effectively to declare . . . law [of the applicable state] in such a fashion as our sister circuit." App. 260a. This issue is ripe for review upon full briefs of the parties.

the Second Circuit's opinion in *Factors,* requiring deference to the Fourth Circuit, but also this Court's decision in *Vandenbark* v. *Owens-Illinois, Co.*, 311 U.S. 538 (1941), which should have compelled the Third Circuit at least to consider the effect of *Wilson* on the decisional law relied upon by the Third Circuit in *Seese. Vandenbark* admonishes that intervening decisions on controlling law while a matter is *sub judice* will "cause reversal of judgments" based on law inconsistent with a later declaration of that State's law. *Vandenbark* v. *Owens-Illinois, Co.*, 311 U.S. at 543. By denying petitioners' timely motion, the Third Circuit refused to consider an intervening decision on controlling law. Clearly, therefore, the basis of the supplemental brief herein was the Third Circuit's decision, the text of which was not received by petitioners until August 24, 1981, after the filing of the petition on August 21, 1981.

Respondents also misstate facts known to them by asserting that petitioners had written the petition in advance in "anticipation that their motion would be denied." Respondents' Second Brief at 2. It is true that a draft of the petition was sent to the printer in advance of August 20, 1981. On July 31, 1981, petitioners, in seeking a stay of the mandate from the Third Circuit, had represented that they would file the petition by August 21, 1981 in order to meet respondents' unwarranted accusation that petitioners were delaying filing of the petition by seeking an extension of the mandate until September 23, 1981 the deadline for filing with this court. App. T. at 291a. Respondents, having objected to any stay and inviting an early filing of the petition, cannot in good faith now charge that petitioners had until September 23, 1981 to file the petition. Respondents' Second Brief at 2. Respondents choose to ignore that the stay of the mandate expired on

August 24, 1981 and that the motion to extend the stay was denied on August 20, 1981.

It is not true that petitioners believed their motions would be denied. On the contrary, petitioners believed the motions would be granted and that the Third Circuit would correct its opinion, following *Vandenbark* if not *Factors*, and reverse the judgment below.

However, the Third Circuit refused to follow such a course necessitating this Petition for a Writ of Certiorari and Supplemental Brief. It is respectfully submitted that the instant matter presents this Court with compelling novel issues which must be resolved in "[f]airness to the public . . . making clear that there is a single, authoritative answer to the particular state law issue, instead of leaving the matter subject to the varying interpretations of the courts of appeals for the several circuits." *Factors*, App. 253a. This is particularly true here where a North Carolina resident in order to avoid the ruling of North Carolina courts filed under diversity jurisdiction outside of North Carolina in a New Jersey federal court. If the matter were filed in a North Carolina federal court, the instant plaintiffs would clearly have no cause of action. *See Wilson* v. *Ford Motor Co., supra.* App. P.

By filing a brief that avoids the legal issues, respondents in effect admit that they cannot persuasively contest the merits and concede that the issue presents a conflict which is ripe for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should consider the issues raised in both the Supplemental Brief and the Petition for Writ of Certiorari and that the Petition for Writ of Certiorari be granted so that diversity jurisdiction is not abused by forum shopping efforts to "create" needless diversity jurisdiction in search of a "better" interpretation of state law.

Respectfully submitted,

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Dated: September 22, 1981

SUPPLEMENTAL APPENDIX

APPENDIX T

Motion for Extension of Stay of Mandate, Papers in Support and Opposition Thereto, and Order of the United States Court of Appeals for the Third Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees,

VS.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants.

MOTION FOR EXTENSION OF STAY OF MANDATE

To: HAROLD UNGAR, ESQ.
Williams & Connolly
Hill Building
Washington, D.C. 20006

Appendix T

HENRY H. WALLACE, ESQ.
Wallace, Chapas & Gravina
8th Floor Arrott Building
Fourth and Wood Streets
Pittsburgh, Pennsylvania 15222

SIRS:

PLEASE TAKE NOTICE, that the undersigned, attorneys for Volkswagenwerk, A.G., and Volkswagen of America, Inc., appellants in the above-captioned matter, hereby apply to the United States Court of Appeals for the Third Circuit, pursuant to Rules 41(b), 27(b), and 26(b) of the Federal Rules of Appellate Procedure of the United States Court of Appeals for the Third Circuit for an extension of stay of mandate until September 23, 1981.

PLEASE TAKE FURTHER NOTICE, that appellants shall rely on the affidavit of John T. Dolan, Esq. submitted herewith.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Appellants
By: JOHN T. DOLAN

DATED: July 24, 1981

CERTIFICATION

The undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit. The undersigned also certifies that a copy of the Motion, supporting papers and a proposed Order have been sent by Express Mail to counsel for the appellees.

JOHN H. KLOCK

DATED: July 24, 1981

Appendix T

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NO. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees,

VS.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants.

AFFIDAVIT

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } SS.:

1. I, JOHN T. DOLAN, am a partner in the law firm of Crummy, Del Deo, Dolan & Purcell, attorneys for the defendants, Volkswagen of America, Inc. and Volkswagenwerk A.G .in the above-captioned matter and am personally familar with the facts in this case.

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2. On June 26, 1981, the Petition for Rehearing In Banc was denied by this Court. A copy of the Order is attached hereto as Exhibit A.

3. On July 2, 1981, this firm on behalf of defendants filed a Motion for an Extension of the Stay of the Mandate pending a filing of a Petition for a Writ of Certiorari to the Surpeme Court of the United States. The time for filing the Petition for Writ of Certiorari expires on September 23, 1981.

4. On July 9, 1981, this Court granted an extension of the Stay of the Mandate until August 2, 1981. A copy of the Order is attached hereto as Exhibit B.

5. Under the comments to Rule 41 of the Federal Rules of Appellate Procedure, it should be noted that upon filing the Writ for a Petition of Certiorari in the Supreme Court and notification to this Court by the Clerk of the Supreme Court that the Petition has been so filed, the Mandate continues to be stayed pending the determination by the United States Supreme Court of the Petition for the Writ of Certiorari.

6. We are in the process of drafting our Petition for Writ of Certiorari and expect to file it prior to September 23, 1981. The Petition embraces several constitutional issues of a complex nature. Indeed, several of the constitutional issues which we will raise in the Petition for Writ of Certiorari have never been addressed previously by the United States Supreme Court. Due to the complex and novel nature of these important constitutional questions and the extensive research which has been and will be required in order to properly present them to the Supreme

Court, it is respectfully requested that the Stay of the Mandate be continued to September 23, 1981. Such an extension will, of course, be co-extensive with the time allowed by the Rules of the Supreme Court of the United States for the filing of a Writ of Certiorari and it is submitted that the time permitted is that which will be necessary in order to properly present these issues to the Supreme Court.

7. In view of the fact that the Mandate has been stayed and will continue to be stayed upon the filing of the Petition, it is submitted that the Stay should be continued to the time within which the Petition must be filed under the Rules.

8. It is further submitted that this Motion is not filed for the purpose of delay but solely for the purpose of providing sufficient time, as is permitted by the Rules for the filing of a Petition, to properly present the important and novel constitutional issues to the Supreme Court.

JOHN T. DOLAN

Sworn and Subscribed to
before me this 24th day
of July, 1981.

Eleanor M. Doganier
A Notary Public of New Jersey
My Commission Expires Jan. 4, 1985

Appendix T

EXHIBIT A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees,

VS.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation, and THOMAS S. WEIR, an individual,

Appellants.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Volkswagenwerk, A.G. and Volkswagen of America, Inc. in the above entitled case having been submitted to the judges who par-

ticipated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

Illegible

Dated: June 26, 1981

Appendix T

EXHIBIT B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

VS.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation, and THOMAS S. WEIR, an individual,

VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGENWERK, A.G.,

Appellants.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 2, 1981.

Illegible
Circuit Judge

Dated: July 9, 1981

Appendix T

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET No. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees,

vs.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants.

APPELLEES' RESPONSE TO APPELLANTS' MOTION FOR EXTENSION OF STAY OF MANDATE

Upon the grounds hereinafter stated, the appellees oppose the motion of the appellants for further extension of the stay of this Court's mandate from August 2, 1981 to September 23, 1981:

1. On April 27, 1981, this Court filed its opinion affirming the judgment of the District Court for the Dis-

trict of New Jersey entered in favor of the appellees on April 2, 1980.

2. On May 28, 1981, this Court's mandate was issued to the District Court, but, by orders of June 10, 1981, the mandate was recalled and the appellants were granted leave to file their petition for rehearing out of time.

3. Thereafter, the appellants filed their petition for rehearing and, by the Court's order of June 26, 1981, the said petition was denied.

4. By their motion of June 30, 1981, the appellants sought a stay of this Court's mandate until the expiration of their time to file a petition for certiorari in the United States Supreme Court. Appellees filed an opposition to any stay for a greater period than the thirty days authorized by Rule 41(b), Fed. R. App. P.

5. By order of July 9, 1981, the Court stayed the issuance of its mandate until August 2, 1981.

6. By their instant motion, a copy of which was delivered to the office of appellees' counsel over the weekend but not seen by him until this morning, July 27, 1981, appellants now seek a further stay of this Court's mandate for an additional fifty-two (52) days, until September 23, 1981, the due date of any petition for certiorari they may wish to file in the Supreme Court. They invoke, moreover, the summary procedure of Rule 27(b), Fed. R. App. P., whereby their motion could be granted without awaiting appellees' response.

7. In support of their motion, the appellants assert that they intend to file, by September 23, 1981, a petition for certiorari embracing "several constitutional issues of a complex nature," several of which "have never been addressed previously by the United States Supreme Court." They do not, however, vouch-safe to the Court so much as a hint as to the identity or even the nature of those purported issues.

8. The appellants further state that they require additional time because of "the complex and novel nature of these important constitutional questions. . . ." Since none of the purported questions are identified, however, the Court is being asked to take on faith the appellants' representation of the time required for the preparation of a petition for certiorari.

9. Nor do the appellants attempt to explain to the Court why the three months that have passed since the Court's opinion of April 27, 1981—or even the month since the Court's denial of their petition for rehearing—have not been ample time for the preparation of a petition for certiorari.

10. We earnestly submit that six years is long enough for the appellees to have borne their terrible injuries without recompense. If the appellants wish to present undescribed issues to the Supreme Court, let them do so, but without the cruel advantage of any further delay in paying the judgment. Moreover, if the appellants, having exhausted the patience of this Court, think they can demonstrate any basis for further delay, let them try to demonstrate it to the Supreme Court.

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CONCLUSION

In light of the foregoing, the appellees earnestly pray that the Court deny the instant motion of the appellants for further delay.

Respectfully submitted,

WILLIAMS & CONNOLLY
By HAROLD UNGAR
Harold Ungar
Washington, D.C. 20006
839 17th Street, N.W.
(202) 331-5000
Attorney for Plaintiffs-Appellees

Dated: July 27, 1981

CERTIFICATE OF SERVICE

The undersigned counsel of record for the appellees and a member of the bar of this Court, hereby certifies that on this, the 27th day of July, 1981, he has caused to be served a copy of the foregoing Appellees' Response to Appellants' Motion For Extension Of Stay Of Mandate upon counsel for the appellants, by Express Mail, postage prepaid, addressed to:

John T. Dolan, Esquire
Crummy, Del Deo, Dolan & Purcell
Gateway I
Newark, New Jersey 07102
Counsel for Appellants

HAROLD UNGAR
Harold Ungar

Appendix T

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees,

vs.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation,

Appellants.

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW JERSEY,)
COUNTY OF ESSEX,) ss.:

1. I, JOHN T. DOLAN, am a partner in the law firm of Crummy, Del Deo, Dolan & Purcell, attorneys for the defendants, Volkswagen of America, Inc. and Volkswagenwerk, A.G., in the above captioned matter and am personally familiar with the facts in this case.

Appendix T

2. On July 24, 1981, a Motion was filed in behalf of the defendants herein seeking an extension of the Stay of the Mandate in the above captioned matter until September 23, 1981, which is the date upon which a Petition for a Writ of Certiorari must be filed with the United States Supreme Court.

3. Counsel for the plaintiffs has opposed this Motion on the basis that no further extensions should be granted due to the fact that "six years is long enough for the appellees" to wait for the payment of the Judgment. It should be pointed out that the accident in this matter took place in July of 1975, but the Complaint was not filed until July of 1977 and that the matter was not tried until the fall of 1979. Thus, a majority of the time referred to by counsel for the plaintiffs consisted of plaintiffs' own delay in filing the Complaint, the preparation of the matter for trial and the trial itself. Defendants have moved as expeditiously as possible with respect to the Appeal of this matter, particularly in view of the fact that significant and complex issues were raised on the Appeal to this Court involving a record consisting of over 7,500 pages.

4. However, in view of the position expressed by counsel for the plaintiffs, the defendants would respectfully request that the extension of the Stay of the Mandate which was requested in the Motion pending before this Court be granted only until August 21, 1981, instead of September 23, 1981. Counsel for the defendants have been working diligently on the Petition for a Writ of Certiorari and it is anticipated that it will be completed on or before August 21, 1981. It is respectfully submitted that an extension of the stay of the mandate to this date would satisfy the concerns of counsel for the plaintiffs, while at

the same time providing a fair opportunity to the defendants to properly prepare the Petition to the United States Supreme Court.

5. Accordingly, it is respectfully requested that the Stay of the Mandate in the above captioned matter be extended until August 21, 1981.

JOHN T. DOLAN

Sworn and subscribed to
before me this 31st day
of July, 1981.

Eleanor M. Doganier
A Notary Public of New Jersey
My Commission Expires Jan. 14, 1985

CERTIFICATION

The undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit. The undersigned also certifies that a copy of the Supplemental Affidavit has been sent by Express Mail to counsel for the appellees.

JOHN T. DOLAN

DATED: July 31, 1981.

Appendix T

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET No. 80-1659

BARRY LYNN SEESE, REINALDO IRIZARRY, JR., MARTIN RAMOS and MARCOS TORRES, Administrator of the Estate of JOSE TORRES, Deceased,

Appellees,

vs.

VOLKSWAGENWERK, A.G., a West German corporation, VOLKSWAGEN OF AMERICA, INC., a New Jersey corporation, and THOMAS S. WEIR, an individual,

VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGENWERK, A.G.,

Appellants.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until August 24, 1981. No further extensions will be granted.

DOLORES K. SLOVITER
Circuit *Judge*

Dated: July 31, 1981